TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 21.

MATHEW SCULLY, PLAINTIFF IN ERROR,

vs.

LOUISE SQUIER, JOHN M. FIX, AND JOHN J. MOXLEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

FILED OCTOBER 28, 1907.

(20,895.)

(20,895.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 492.

MATHEW SCULLY, PLAINTIFF IN ERROR,

vs.

LOUISE SQUIER, JOHN M. FIX, AND JOHN Q. MOXLEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

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a In the Supreme Court of the State of Idaho.

No. 1284.

MATHEW SCULLY, Plaintiff and Appellant,
vs.
LOUISE SQUIER, JOHN M. FIX, and JOHN Q. MOXLEY, Defendants and Respondents.

Ben F. Tweedy, Attorney for Appellant.
I. N. Smith, Attorney for Respondents.

Transcript on Appeal.

Appeal from Judgment and Order Overruling Motion for New Trial and from the District Court of the Second Judicial District of the State of Idaho for Nez Perces County.

Filed this 19th day of Jan. 1907.

OLA JOHNESSE, *Clerk*.
By JNO. H. LONG, *Deputy*.

1 In the Supreme Court of the State of Idaho.

MATHEW SCULLY, Plaintiff,
vs.
JOHN M. FIX, JOHN Q. MOXLEY, and LOUISE SQUIRE, Defendants.

Amended Complaint—Action for Injunction and to Abate a Nuisance by Mandatory Injunction.

The plaintiff for his amended complaint by leave of court and for cause of action against the defendants, says:

First.

That he is now and has been continuously for several years immediately before the commencement of this action, a resident, citizen and tax payer of the city of Lewiston, Idaho.

2 Second.

The said city of Lewiston is located and situated upon land entered by the mayor thereof under the laws of Congress applicable thereto as a townsite and as such townsite, the said mayor, years ago received a patent from the United States, conveying the said land to the said mayor as a townsite, and thereupon and immediately thereafter and as required by the laws of Congress of the United States and by the laws of the state of Idaho, applicable thereto, surveyed

and platted the said land as a townsite into lots, blocks, streets alleys and proper sub-divisions and made a map of the said survey and platting and immediately and thereupon filed the said map of the said survey and platting in the auditor's office of Nez Perces county and state of Idaho, and caused the same to be recorded in the said office by the auditor of the said county as the original survey and plat of the city of Lewiston, and is now on file and of record therein, and thereafter and thereupon, the said mayor conveyed by deeds to the private individuals such portion of the said land entered as aforesaid as a townsite and applied for by them according to the said original survey and plat and no person, then and there ap-
3 plied for deeds of conveyance who received deeds otherwise than according to the said original survey and plat, and the persons who own lots in the city of Lewiston within said original survey and plat hold the same according to the said original survey and plat and the said plat and survey of block twenty-four has never been corrected or changed, and the plaintiff purchased lot six (6) of block 24 according to the said original survey and plat, and the said lot has been sold and conveyed repeatedly according to the said original survey and plat. The defendants' lots owned by them respectively were conveyed originally by the mayor of Lewiston to the first owners thereof according to the said original survey and plat and deeds thereto accepted according to the said original survey and plat and said lots have been since conveyed to the defendants and their grantors according to the said original survey and plat and the said original survey and plat has, at all times, been recognized and referred to in the deeds conveying the lots owned by the defendants respectively, and the property owners of lots within the said original survey, including the plaintiff, have acquired a vested right to have all the streets and alleys opened and kept open
4 as originally surveyed and platted and according to the said original survey and plat. D street of the city of Lewiston, north of the said block twenty-four was surveyed and platted and marked on the said original survey and plat as shown by the map thereof and was dedicated as D street and as a public street to the public and was and became a street of the city of Lewiston before the said mayor executed deeds of conveyance of lots five, four, three and two to any of the persons who received the original deeds thereto, the said lots being situate in the said block twenty-four, and the said deeds were received and accepted according to the said original survey and plat and have, at all times, been held according to the said original survey and plat under descriptions in deeds referring to the said original survey and plat and the defendants and each of them are now estopped to dispute the correctness of the said original survey and the original lines, marking the south boundary of the said D street and the north boundary of lots five, four, three and two aforesaid, and must now confine all private improvements and buildings proposed to be made and erected by them within the boundaries of the lots owned by them respectively according
5 to the original lines and survey and plat aforesaid and must not cross the said original south line of said D street into D

street with their brick buildings proposed to be erected by them on the lots owned respectively by each of them.

Third.

The plaintiff now owns and has for several years owned, lot six (6) of the said block twenty-four of the said original survey and plat of Lewiston, and heretofore, desiring to erect a three-story brick thereon at an expense of several thousand dollars applied to the city engineer, Edson Briggs, to be shown the original south line of said D street according to the original survey and plat aforesaid, and the said Edson Briggs run the lines on the ground according to the said original survey and plat and ascertained the original south line of said D street, and, thereupon, the plaintiff erected a three-story brick building, covering the entire lot six at an expense of several thousands of dollars, relying on the said original survey and plat as fixing and establishing the boundary lines of the said D street, and the north end of the plaintiff's said brick building is the exact south line and boundary of the said D street. The plaintiff placed windows in each room of the third, second and first stories of the said build-
6 ing and a door leading from the first floor into and upon the said D street, to permit the light and air to enter the said rooms from all parts of the said D street, and also to have a view of all parts of the said D street, and extended the said brick building to the south boundary line of the said D street to have the sym-etry of the buildings erected on the south line of the said street along the said D street and to have the benefit of the view of the said north end of his said building from all points on the said street and on and along the sidewalk on the south side of the said D street, and the said light, air and view are valuable and increase the rental value of the said brick building and make the said brick building much more valuable. The plaintiff also placed a door in the north end of the said building on the first floor so as to have ingress and egress to and from all parts of the said sidewalk on the said south side of the said D street, and over and upon all parts of the said sidewalk immediately adjoining his said lot on the east and west and the said right of egress and ingress to and from all parts of the sidewalk im-
mediately adjoining the plaintiff's lot and building is valuable
7 and makes the said building have a greater rental value and increases the value of the said property. The second and third floor rooms are occupied for the purpose of lodging and the first floor room is occupied by the United States government for post-office purposes, and is arranged for any business in the line of retail trade. The light, air and view from all parts of the said D street as the said building is constructed necessarily ensue and benefit the said property materially, and are of great value to the plaintiff and so also is the right of egress and ingress.

Fourth.

The defendant, John M. Fix, owns lots five and four of the said block twenty-four, the defendant, John Q. Moxley, owns lot three of

the said block, and the defendant, Louise Squire, owns lot two thereof, and the defendants and each of them, intend to and propose and will erect three story brick buildings on the lots owned by them respectively and have the plans therefor prepared and accepted and contracts let, but the defendants each and all of them intend to, propose and will extend the solid walls of the said three story bricks across the original south line of the said D street and the actual south line thereof, into and upon the said D street
8 and south sidewalk thereof, a distance of four feet and four inches and thereby and thereupon permanently occupy with the said brick buildings four feet and four inches by one hundred and five feet, being in all four hundred and fifty-five square feet of the said D street and of that part thereof devoted to sidewalk purposes for the use of pedestrians upon the said street, and the west wall of the said encroachment aforesaid will extend and immediately adjoin the plaintiff's building, into the said D street four feet and four inches, at right angles with the said building of the plaintiff and thereby leave the north end of the plaintiff's building four feet and four inches south of the north face of the part of said buildings encroaching upon said D street, and the aforesaid light, air and view will be cut off and obstructed, and the aforesaid ingress and egress be materially obstructed and cut off, and the defendants aid, encourage and abet each other in the said encroachment, and join in destroying the plaintiff's right to the air, light and view ensuing necessarily from the said D street and in destroying the symmetry of the plaintiff's said building along the said D street, and in obstructing and cutting off the said
9 light, air and view and ingress and egress and symmetry of the plaintiff's building along D street to his irreparable damage and the defendants join in the determination to thus damage the plaintiff for an indefinite future time all of which the defendants are doing without any authority or authorization from the city of Lewiston or any of its agents or officers and against the desire and wish of this plaintiff. Before the commencement of this action the plaintiff made known to the defendants and each of them his objection to the said obstruction of the said D street, but the defendants wilfully and intentionally ignore the rights of the plaintiff, and with full knowledge that he claims that they are intending to encroach upon the said D street and pass over the said original lines of the said street and the actual south boundary line according to the map and dedication aforesaid and upon the said D street aforesaid and with knowledge of the lines of the said street according to the said original survey and plat, they encroach upon the said D street and intend to if not restrained complete the said three story brick buildings, standing four hundred and fifty-five square feet upon the said D street beyond and
10 north of the north boundary lines of their said lots in block twenty-four.

Fifth.

The city of Lewiston with full knowledge of the said encroachment is making no effort to prevent the said encroachment upon

the said D street and will not prevent or protect the rights of the plaintiff and the taxpayers of the said city of Lewiston, and none of the officers of the said city will take any steps to prevent or remove the said obstruction and will allow and permit the said encroachments and place defendants in the position where they will claim that the city is equitably estopped after the expenditure of several thousand dollars to claim any part of the said four hundred and fifty five square feet in and upon D street aforesaid, and the defendants and the city of Lewiston join in an attempt to divert the said four hundred and fifty five square feet of the said D street absolutely from the use to which it was dedicated and to appropriate the same to exclusive private use and by estoppel convey, as it were, the fee simple title and all title and right of the public to the defendants, and the said plaintiff as a taxpayer of the city for himself and all other taxpayers is interested in restraining the unlawful disposition of a part of the said D street by the
11 city, through and by means of an estoppel which may be claimed by defendants.

Sixth.

The sidewalk on the south side of the said D street, if the same is not obstructed, will be sixteen feet wide, as wide as is any sidewalk along the business streets of the city of Lewiston, and the same will be used by the general public. Said encroachment will greatly damage the plaintiff beyond that which is common to the public generally by injuring and depreciating the value of the plaintiff's property and by destroying the sym-etry of plaintiff's building along D street, which is valuable, and by obstructing the light, air and view necessarily ensuing therefrom and by depreciating the rental value of the plaintiff's property, in that the view of persons going west along D street from points east of the plaintiff's building will be cut off from plaintiff's property at all points on the said street within the lines directly crossing the said obstruction to the north end of the plaintiff's building, and the plaintiff and persons occupying the plaintiff's said building as tenants can not see all parts of the said street and scarcely any part of the said sidewalk east of the north end of the said building, and the said ob-
12 struction and cutting off of the said light, air, view egress and ingress by the proposed encroachment upon the said D street will continue to damage the plaintiff and his said property at all times so long as the said encroachment is permitted to exist if it be accomplished before an injunction is granted, to his irreparable damage, and the plaintiff avers that in consequence of the aforesaid encroachment and obstruction and cutting off of the said light, air, view, ingress and egress, and the destruction of the symmetry of his said building along D street, the rental value of his said building will be depreciated and diminished materially and it will be harder and more difficult to rent his said building, and pedestrians on the said south sidewalk of the said D street could not see and would not know of the existence of the plaintiff's building until they came directly in front thereof and, then and there, they would

find it carefully hid behind the obstructions of the defendants maintained in the said D street and the defendants, aiding and abetting each other, by all the aforesaid acts proposed and intended to be done and which will be done if not restrained will irreparably damage the plaintiff for which injury and violation of his
13 rights he has no adequate, speedy or sufficient remedy at the law and plaintiff will lose tenants and rent because of said encroachment.

Wherefore, the plaintiff asks an injunction against the defendants, restraining and prohibiting them and each of them from encroaching upon the said D street, and whatever of the said buildings that may be erected upon the said D street before an injunction can be obtained be declared a public nuisance, damaging the public and this plaintiff's private rights, and that the same be abated and removed from the said D street and all other relief to which the plaintiff is entitled against the defendants and each of them and all costs of this action, and for a mandatory injunction against the defendants.

BEN F. TWEEDY,
Attorney for Plaintiff.

Residence and Postoffice is Lewiston, Idaho.

Duly verified: Filed October 2, 1905.

J. R. LYDON, *Clerk*,
By GEO. E. ERB, *Deputy*.

Answer.

Defendants, answering the complaint.

1. Admit the allegations of paragraph one thereof.

14 2. The defendants request the court to take judicial notice and knowledge of the various acts of the State and Territorial Legislatures of the States of Washington and Idaho, relative to the incorporation of the city of Lewiston.

Deny that the Mayor, Trustee, of the City of Lewiston, immediately or thereupon, upon the issuance of a patent from the United States, to the lands upon which the City of Lewiston, Idaho, was originally situated, or in accordance with the laws of Congress or of the Legislature of the Territory of Idaho, applicable thereto, caused the said townsite, of the city of Lewiston, to be surveyed or platted or that the same was surveyed or platted in accordance with said laws, into lots, or blocks or streets or alleys or proper subdivisions; admit that a survey was made, but deny the correctness thereof, under the said laws; deny that, immediately or thereupon, upon the completion of said survey, a map was filed of said survey, or platting, in the auditor's office of Nez Perces county, Idaho; admit that a map was filed purporting to be of the said survey, but in truth and in fact, the same was of the said survey showing amend-

ments thereto, and thereof. Deny the correctness of the said
15 map, as to showing the occupancy and use of the lands embraced within the said city of Lewiston. Admit that the said map with amendments and corrections thereon, was filed and is now of record in the office of the county recorder of Nez Perces county, Idaho.

Admit that some of the deeds issued were in accordance with the said plat; deny that all deeds so issued were in accordance with the plat as originally made, but aver that the same was in accordance with the use and occupation of the lands prior to the said survey, and with the said survey and plat, as the same were and had been amended. Deny that no person there or then applied for deeds of conveyance who received deeds otherwise than according to the alleged and pretended original survey, referred to in the complaint; deny that all the persons who hold deeds to land within the city of Lewiston, within the said original survey, being the survey referred to by plaintiff, or plat, hold the same according to the said original survey or plat; deny that the said plat or survey of block 24 of the city of Lewiston, has never been corrected or amended; or changed; defendants have no knowledge or information as to how or why the plaintiff purchased lot 6 of block 24, aforesaid, and there-
16 fore deny the allegation thereof concerning the method of conveyance and acquisition, set forth in the complaint; admit that the defendants' lots as owned by them were conveyed originally to the first owners thereof, but deny that such conveyances were made according to the E. B. True survey or plat, or that said lots have been since conveyed to defendants according thereto; deny that the said plat of E. B. True and his said survey, have been recognized and referred to, except for the convenient purpose of identification, but not for the purpose of specifying the number of square feet owned by defendants, at all or any times, and deny that the property owners in said block 24, including the plaintiff, have acquired a vested or other right to have all or any of the streets or alleys opened or kept open, as surveyed or platted by E. B. True, the same being the survey and plat referred to in the complaint of the plaintiff.

Deny that "D" street, as market or platted on the said original survey and plat of E. B. True, was ever dedicated as therein delineated, or that the same was ever used as a street, as outlined or delineated on the said plat and deny that the public ever used that portion of the said "D" street—as a street—which was em-
17 braced within the enclosures and covered by the buildings on the lots owned by these defendants, or their predecessors in interest. Deny that "D" street as delineated on the said plat of E. B. True, ever was or became a public street, as to that portion of the said plat which wrongfully places parts of the lands of these defendants, within the limit of the said "D" street and aver that the said plat of the said city of Lewiston as delineated by E. B. True, and especially of Block- 24 and 23 and 22 thereof, was amended so as to conform to the actual use and occupation of the lands belonging to the actual owners thereof, including these defendants and

their predecessors in interest. Deny that the said "D" street as delineated by E. B. True, was ever or at all dedicated as a street or that the same became a street and deny that the lots situate in block 24, were properly described or delineated thereon; deny that these answering defendants or their predecessors in interest, received or accepted deeds to their said lands in accordance with the original E. B. True survey, but aver that such deeds as the defendants and their predecessors in interest received from the said city, were intended to convey to the defendants and their predecessors
18 in interest, the lands actually occupied by them, and consistent with the established line of "D" street, prior to the survey of E. B. True; deny that the defendants are now estopped from denying the validity of the said E. B. True survey as to block 24, and aver that the city of Lewiston, after the execution of the said plat and prior to its recordation, repudiated the same and amended the same so as to affect the whole of block 24 of the said city of Lewiston, and to affect the lots owned by these defendants and their predecessors in interest so as to give to them, the lands actually occupied and claimed by them, in accordance with the provisions of laws under and by virtue of which said survey was purported to have been made. These defendants admit that they must not cross the original south line of "D" street, but aver that the plat of E. B. True as originally made, does not show the correct location of the said south line of "D" street, but that the said survey and plat do attempt to take from these defendants and their predecessors in interest, and others owning property within the said city of Lewiston, property rights which had become vested in them long prior to the said survey of E. B. True.

3. As to whether or not the plaintiff ever applied to the
19 city of Lewiston to fix the line of "D" street, prior to the erection of his building on lot 6, block 24, these defendants have no knowledge or information sufficient to enable them to form a belief and therefore deny the same and place their denial upon that ground; these defendants deny that the north end of the plaintiff's building is the exact south line, or any line whatever of "D" street in the city of Lewiston, Idaho; admit that the plaintiff put windows and a door in his building, but deny that either the windows or the door of plaintiff's building, open out onto or are openings onto or upon "D" street; deny that the plaintiff extended his said building out to the south line of "D" street or to make the same symmetrical therewith at all, for any purpose whatever or at all; or that for the purposes of symmetry or light or air or view, the plaintiff ever made any openings onto "D" street, in his said building; deny that the light and air and view from plaintiff's building, are from "D" street or abutt thereon or are valuable thereby; deny that the door referred to in the complaint, abuts upon, or furnished a means of ingress or egress directly to "D" street; deny that the light and air and view or the light or air from all parts of
20 "D" street, as the said building is constructed, necessarily or otherwise, ensue, or benefit the said property at all, or ma-

terially or are of great or any value to the plaintiff, or that so also is the alleged right of ingress or egress to "D" street; deny that the means of ingress or egress referred to in the complaint, are directly upon or about upon "D" street, and aver that the said building of plaintiff does not extend out to "D" street, but that the said building sets in and away from "D" street the distance of approximately four (4) feet;

4. Deny that the defendants or any or either of them intend to or propose to extend their proposed buildings out into, or over or across the true line of "D" street of the actual south line thereof; or into or upon the said "D" street or the south sidewalk thereof, a distance of four feet or any other distance or that the defendants or any or either of them will thereby or thereupon occupy, permanently or otherwise, four feet and four inches or any space whatever, of the actual "D" street or that part thereof or any part thereof which was or is or ever was used, for pedestrians or devoted to sidewalk pur-
21 poses; deny that any wall of any proposed building of the defendants or either of them will extend into or occupy any portion of "D" street whatever or at all; or that the building or buildings of the said defendants or any or either of them will thereby or thereupon leave the north end or any end of plaintiff's building any distance whatever south of any defendant's building encroaching upon "D" street; deny that the defendant or any or either of them are encroaching or have encroached or threaten to encroach upon "D" street at any place whatever or at all; or that defendant's have attempted to or will cut off any light or air or view of "D" street which plaintiff might have if he had constructed his building in accordance with the true and actual south line of "D" street; or that defendants or any or either of them have in any way or will in any manner, interfere with plaintiff's ingress or egress to or from "D" street, whatever or at all; deny that the defendants aid or encourage or abet each other in the construction of any encroachment or obstruction or intrusion into or upon "D" street or any part thereof; deny that the defendants or any or either of them aid or assist or abet any person whomsoever in any attempt to de-
22 stroy plaintiff's light or air or view of "D" street or any part or parcel thereof; deny that defendants or any or either of them are attempting to or will, in any manner destroy any symmetry of the plaintiff's building, with "D" street or other street or thing whatever or at all; or that plaintiff will be irreparably damaged in any manner whatever by the buildings of defendants, or that plaintiff will be damaged in any way whatever irreparably or otherwise, by any act or building or proposed building, of the said defendants or any or either of them; deny that defendants or any or either of them have at any time, or do now, join in a determination to damage plaintiff in any manner whatever or at all, irreparably or otherwise or for any length of time whatever or at all; deny that the said defendants are doing any act or acts without authority or authorization from the said city of Lewiston, or any of its agents or officers whatever or at all; deny that defendants ever proposed or are now erecting or constructing any obstruction whatever into or upon "D"

street, whatever or at all; deny that defendants or any or either of them have at any time or at all disregarded any right of plaintiff or that they now do so disregard any right of plaintiff, what-
23 ever or at all; Admit that plaintiff claims that defendants are encroaching upon "D" street, but deny the said encroachment; deny that defendants or any or either of them are intending to or have ever, trespassed upon or encroached upon the actual south line of "D" street in any manner, or have ever passed over the said actual south line of "D" street with any structure whatever or at all; admit that the survey of E. B. True, before the same was amended, cut off part of the lots which these defendants and their predecessors in interest actually occupied at the time of the survey by him, but aver that after the amendment of the said plat and of the survey of block and the amendment of the south line of "D" street, as appears from the plat thereof, that these defendants and their predecessors in interest were restored to their rights thus wrongfully and unlawfully sought to be taken from them; deny that these defendants or any or either of them have ever at any time, or at all threatened to, or will, erect any building whatever beyond the actual south line of "D" street, or standing 455 square feet in "D" street or any number of feet into or upon the said street or beyond the north line of the lots owned respectively, severally
24 by the said defendants and each of them, in block 24 of the said city of Lewiston, Idaho.

5. Denies that the city of Lewiston has any knowledge of any encroachment whatever, deny that any encroachment, exists in "D" street, as alleged in the complaint, or that these defendants or any or either of them are encroaching thereon in any manner whatever or at all; deny that the city of Lewiston will not protect the rights of the plaintiff in or to the public streets of the city of Lewiston and deny that none of the officers of the said city will not take any steps to prevent encroachments on the streets thereof; deny that the buildings of these defendants or of any or either of them are an obstruction in or an encroachment upon any street whatever or at all; deny that the city of Lewiston or the officers thereof will allow or permit any encroachment or obstruction to be made, placed or put upon or into or over any of the streets thereof; deny that these defendants are trying to place the city of Lewiston where it will be estopped from asserting its rights in or to any street whatever or at all; deny that these defendants or any or either of them join in any manner with the city of Lewiston, in attempting in any way to divert
25 any part of any street within the limits thereof or at all; deny that the dedication of "D" street ever included the lands which these defendants and their predecessors in interest, owned; deny that these defendants are attempting to divert any part of any street whatever or at all from the use as street, or to which it was dedicated, or to appropriate any part of any street whatever or at all, to exclusive or any private use whatever or at all, or by estoppel, to claim, as it were, the fee simple title thereto or to any part of any street whatever or at all; deny that there is any unlawful or other improper use of any part of "D" street whatever or at all by the

defendants or any or either of them; deny that the plaintiff as a taxpayer of the said city, for himself or any one else, or for all or any of the taxpayers thereof, is interested in restraining the unlawful disposition of any part of "D" street of said city, and deny that there is any attempt at all by defendants or any or either of them to divert any part of "D" street whatever or at all.

6. Deny that the sidewalk on the south side of "D" street, if the same is not obstructed will be sixteen feet in width, or any other width than one-fifth of the entire street; deny that the said
26 alleged or any encroachment, will greatly or otherwise damage or injure the plaintiff in any manner whatever or at all, to any other or greater extent than any other citizen would be damaged or injured if any encroachment were shown thereon; deny that any of such alleged or pretended injuries as are claimed in the complaint, are the result of any act or thing done by the defendants of any or either of them; deny that defendants in any manner are interfering with the symmetry of the building of plaintiff with "D" street, or are interfering in any manner with the light, or view or air of the plaintiff in or to his building or the right of ingress or egress thereto or therein, and deny that the rental value of the plaintiff's said property will be in any manner impaired or injured by any act or thing done by the defendants or either or any of them; deny that the view of any person travelling upon "D" street, will be in any manner cut off of or from any part of the building of plaintiff, by any act or thing which these defendants or any or either of them are doing or are threatening to do or contemplating to do; deny that the plaintiff or his tenants will be deprived of any light or air or view or right of ingress or egress
27 to or from plaintiff's said building by any act or thing done, made or suffered by the defendants or any or either of them, deny that the alleged obstruction and cutting off of the light, air, view, ingress or egress or any of them of the said plaintiff, was done or made by any act or thing done by these answering defendants or any or either of them; deny that any act or thing done made or suffered by defendants will in any manner damage the plaintiff in any way whatever or at all, or will continue to so damage the plaintiff in any of his rights, unless the same are restrained by the court; deny that the rental value of the plaintiff's building will in any manner be affected by any act or thing, done, made, or suffered by defendants or any or either of them; deny the cutting of the light of plaintiff's building off or of the view thereof or the ingress or egress thereto, is due to any act or thing done, made or suffered by defendants or any or either of them; or that the symmetry of the plaintiff's building with "D" street, will in any manner or at all be affected by anything which these defendants or any or either of them have done, made or suffered in any manner or at all; deny that pedestrians along the south side of "D" street in the said city of Lewis-
28 ton would be prevented from seeing the building of the plaintiff, by reason of any act or thing done, made or suffered by these answering defendants or any or either of them; deny that the pedestrians along or over the south side of "D" street would be

prevented from seeing or knowing of the existence of the said building of the plaintiff, by reason of any act or thing done made or suffered by these defendants or any or either of them, in any manner or at all; deny that any pedestrians would find the building of plaintiff carefully hid behind the alleged and pretended obstruction referred to in the complaint; deny that there is any obstruction or encroachment upon "D" street, in any manner, whatever or at all, done made or suffered by these defendants or any or either of them; deny that these defendants or any of them or either of them in any manner aid or assist or abet each other or any person whomsoever or at all in the erection, construction or maintenance of any encroachment or obstruction whatever or at all in or upon "D" street in the said city or any part thereof and deny that the plaintiff by any act of the defendants, set out in the complaint or otherwise or at all will at all be damaged in any sum whatever or at all, or
29 irreparably or otherwise, and deny that for any injury or violation of the alleged and pretended rights of the plaintiff, by any act or thing done made or suffered by these answering defendants or any or either of them the plaintiff has no plain or speedy or adequate remedy at law or otherwise, or sufficient remedy at law, or that plaintiff will lose tenants or rent because of any act or thing done, or made or suffered by defendants or any or either of them or by reason of the said alleged and pretended encroachment or any part thereof.

Affirmatively.

These defendants aver:

1. That the city of Lewiston, Idaho, was incorporated by act of the Legislative assembly of the territory of Washington, of which this Honorable Court is asked to take judicial notice and knowledge.

That thereafter, and by special acts of the legislature of the territory and state of Idaho, the said city of Lewiston was given a special charter, and of these, the court is respectfully asked to take judicial notice and knowledge.

2. That after the incorporation of the city of Lewiston, and
30 long prior to the survey and platting thereof by E. B. True as surveyor and delineator, the said city was surveyed, and platted into streets and blocks and alleys and thoroughfares; and that the blocks between "D" and "E" or Montgomery streets in the said city were 50 by 100, the 50 foot measurement extending north and south, and that the portion of the said city of Lewiston now known as blocks 22, 23 and 24, were 50 from north to south, except where the said lots, at or about the commencement of lot 4, block 24 of the said city as it now stands, were widened by a bend or curve on "E" or Main street or Montgomery street,—all three of which names are applied to the same street, and that the defendants and their predecessors in interest, long prior to the year 1874, were in the actual occupancy and the use and enjoyment of these premises which they now enjoy and on which and covering which, they now seek to erect the three story brick buildings referred to in the complaint.

3. That at about the year 1874, and long after the rights of the defendants and their predecessors in interest had become vested in and to the premises they now claim, which are affected by these proceedings, and long after the rights of the defendants and
31 their predecessors in interest had been established by use and occupation, the mayor trustee, of the city of Lewiston, to-wit, Henry W. Stainton, entered the said townsite of Lewiston, as a townsite under the laws of Congress, for the use and benefit of the several use and benefits of the inhabitants of the said town, as their interests should appear, and that the court is requested to take judicial notice and knowledge of the said entry and of the laws under which the same was made.

4. That thereafter, and after the issuance of a patent to the said mayor-trustee, for the said townsite, a plat thereof was made and a survey thereof into lots, streets, blocks, alleys and subdivisions was ordered; that such survey was made and ordered under the laws of Congress of the United States and of the legislative assembly of the territory of Idaho, of which the court is requested to take judicial notice and knowledge, the same as if specifically set out hereat. That the said various laws of which the court is requested to take judicial knowledge and notice, are as follows.

Session Laws of Idaho Territory, Fourth Session, approved December 27, 1866: Session Laws, 1866, page 87.

32 Land office entry showing records of U. S. Land Office at Lewiston, Idaho, being declaratory statement No. 39, made November 21, 1871, by Levi Ankeny, in trust for the inhabitants of the city of Lewiston, claiming settlement in 1861.

Cash entry made June 6th, 1874, therefor, made by Henry W. Stainton in trust, etc., as above alleged.

An act to provide for the survey, platting and disposal of the land in the city of Lewiston, Idaho, pursuant to the United States statutes made and provided, which act is found in Session Laws of Idaho Territory, Seventh Session, page 16, approved January 8th, 1873.

Acts of Congress, entitled "An Act Making Further Provision for the Sale of Public Lands," approved April 24th, 1820.

5. That thereafter one E. B. True was employed as aforesaid, to survey and plat the lands so entered, and was authorized, empowered and commanded to so adjust the said plat as to conform to the condition of the improvements of the use and occupation of the lands affected thereby, and the mayor-trustee was authorized, empowered and required to make and deliver to the *bona fide* occupants of such lands described in said patent, good and sufficient deeds
33 of conveyance in fee simple, according to their respective interests, and for that purpose was authorized to carry the act into effect.

6. That in the making of the survey and the platting of the said city of Lewiston, and more especially of the lots and blocks on the south side of "D" street in the said city, the said E. B. True did not pay regard to or attention to the several use and uses of the land as the same was then occupied and enjoyed by the inhabitants of the city

of Lewiston, and more especially he did not pay any attention to the quantity of lands then used and occupied and enjoyed by these defendants and their predecessors in interest, and that the said E. B. True did not then conform the said "D" street to the street as it was known and used prior to his said survey, nor did he pay due or any regard to the actual use and occupancy and improvements on the said lots.

7. That the south line of said "D" street as the said E. B. True surveyed and delineated the same, cut off of the north end of the lots of the various inhabitants of the said city, which lots had and have a frontage on the south side of "D" street, several feet
34 off of the said lots, in the various blocks, and that in blocks 23 and 24 of the said city, and affecting the lands of these defendants and their predecessors in interest, the said E. B. True, so ran and delineated his line of the south side of "D" street as to cut off of and from the north end of the said lots, approximately four feet more or less, off of each thereof; that such running of said line, crossed and interfered with buildings then standing on the same, and attempted to divest certain vested rights of the various residents and inhabitants and occupants thereof, and the said south line of "D" street as marked upon the map or plat of the said E. B. True did not conform to, nor coincide with the actual south line of the said "D" street as the same had been used and treated as a public street.

8. That thereafter and after the approval of the said survey, as required, such steps were taken that in many instances the said plat and survey of E. B. True, was corrected and changed and amended, and that notwithstanding the designation of lots and blocks by him in his said survey, the said citizens who had theretofore been in the actual use and occupation of the lands as claimed by these defendants at present and as owned and possessed by them, continued to use and occupy with buildings and with actual
35 occupancy, the lands so theretofore claimed and possessed and owned by them and that the strip of four feet approximately, referred to in the complaint as being part of "D" street, was never at any time or at all any part thereof nor was the same used, or occupied as a street or dedicated as such.

9. That the lands occupied and claimed and possessed by these defendants and their predecessors in interest, abutted upon and were contiguous to and adjacent to the true and correct south line of "D" street, and the said survey of E. B. True did not conform thereto.

10. That thereafter, and notwithstanding the said survey of E. B. True—the said plat was amended as these defendants are informed and believe and so state, so that in red ink thereon, there appears a true and correct south line of "D" street, conforming to the several use and occupancy of the said lots referred to in the complaint, as the same are now and were long prior thereto, and have always been used, and possessed and occupied by the defendants and their predecessors in interest.

11. That the said defendant J. Q. Moxley is the owner of lots one and three of the said block 24, and holds deeds by
36 mesne conveyance to lot 1, block 24 and by direct conveyance to lot 3, block 24, as the same were shown on the

plat as amended. That the said lot one, block 24, had always theretofore and prior to the survey of E. B. True been of an area of 1250 feet plus, and the deed which was issued therefor, calls for 1257 square feet of land, although the said survey of E. B. True, states it to contain but 1137 square feet.

12. That lot 2 of block 24, as shown on the plat of E. B. True, contained but 1131 square feet, whereas in truth and in fact according to the actual use and occupancy thereof, the defendant Louise Squier, and her predecessors in interest have always claimed, actually occupied and held by buildings which were on the said lot long prior to the survey of E. B. True, a piece of land containing 1250 square feet of land, and known and commonly called as lot 2, block 24, whereas, according to E. B. True's survey the said lot contained only 1131 square feet; that the extra area so actually occupied is the strip of approximately four feet by 25 feet which the plaintiff herein seeks to enjoin the defendant Louise Squier from building upon; that the said lot so claimed by Louise Squier, has been actually covered by a building for more than 35
37 years last past, and was so occupied by such building, long prior to and at the time of the survey of E. B. True.

That the defendant Louise Squier holds mayor's deed from the city of Lewiston on all lands actually claimed by her.

As to lot 3, block 24, the defendant J. Q. Moxley obtained title thereto by actual occupancy and use, and was so occupying the same and using the same long prior to the survey of E. B. True, and that the said plat was amended as is recited in the deed of conveyance from Henry W. Stainton, mayor trustee, to this defendant John Q. Moxley, and was amended prior to the recordation of the said plat, and that said lot 3 as stated in the survey of E. B. True, contains only 1136 square feet, whereas in truth and in fact the defendant John Q. Moxley actually occupied at the time of the said survey, the lands now sought to be built upon by him. That the said lot 3 was deeded to John Q. Moxley, with an amendment, and that the said amendment contains the lands being the four feet of strip which plaintiff seeks to prevent the defendant Moxley from enjoying but which the defendant Moxley has always and long prior to
38 the survey of E. B. True enjoyed and used and occupied.

That the lands claimed and possessed and occupied by John M. Fix, are commonly known as lots 4 and 5 of block 24, but that the said survey of E. B. True did not pay regard or attention to the actual south line of "D" street, and pretended to put into the street, a strip of land which had long prior thereto and ever since the said survey has been, in the actual use and occupancy of the said John M. Fix and his predecessors in interest. That the said John M. Fix is seeking to construct or erect his new three story brick on the lands actually owned, occupied and possessed by himself and his predecessors in interest, since long prior to the survey of E. B. True and that the said strip so claimed by these defendants in addition to the area of the said lots as admitted and shown by the said survey of E. B. True, was at no time a street or highway or thoroughfare of the said city of Lewiston, and was never used as such, but

that the said strip was at all times named herein and long prior to the survey of E. B. True, in the actual, exclusive, visible and notorious possession of the defendants and their predecessors in interest and never at any time constituted any part of "D"
39 street in the said city of Lewiston, Idaho.

That the plaintiff herein erected his building referred to in the complaint, and did not cover the lands actually theretofore occupied by him and his predecessors in interest.

That in block 24, immediately west of plaintiff's lot, is the property of Robert Grostein, and that the same is entirely covered by a building which was built some 16 or 17 years ago; that the said building of Grostein's was built on the street line as pointed out and directed to be built up to, by the officer of the city of Lewiston, and that the same extends far out beyond the building of Mathew Scully a distance of approximately four feet more or less.

That the said Matthew Scully has placed his building entirely off of and to the south of the south line of "D" street as the same actually existed.

That these answering defendants are informed and believe and so state that the field notes and plat of block 24 as made by E. B. True, are defective and incorrect and that the same will not coincide each with the other.

That after the platting of the city of Lewiston as alleged by E. B. True, there was shown on his said plat "6th" street, which
40 interfered with actual occupancy and use of the various parties and persons then owing the same, and that thereafter such proceedings were had in the District Court of the First Judicial District of Idaho Territory, the same being a court of general jurisdiction, in an action wherein Lowenberg Bros. were plaintiffs and Henry W. Stainton as mayor trustee was defendant that a judgment was duly given, made, rendered and entered adjudging the said plat to be corrected and ordering certain lands theretofore on said plat shown as a street, to be platted and held as a lot or lots, and that the case involved the rights of occupants to hold lands, as against the survey and the same was decided in favor of the occupant, and that the same thereafter became and was the settled law of Lewiston, Idaho, from the date of the rendition of the said decree and was such long prior to the said survey, and that the said decree was rendered about the 15th of October, 1875, and the same has constantly been the construction placed by various residents and inhabitants of the city of Lewiston, as to the rights acquired by the inhabitants thereof, as to the use and occupancy of the lands claimed by them and that the said construction of the rights of *bona fide* occu-
41 pants, prior to the said survey by E. B. True has been the common and accepted construction thereof, and property rights have been builded upon such construction for the past 30 years, within the city of Lewiston.

That these answering defendants seek only to build on their lands so occupied by them and their predecessors in interest from time immemorial and from a time at which the memory of man runneth not to the contrary, and so seek to enjoy and use the said prem-

ises, as the same have been so used by them and their predecessors in interest and are not in any way seeking to take any part of "D" street of the said city. That the said survey and platting of the said blocks 22, 23 and 24 of the said city, as alleged, was made without regard to the actual occupancy and use of the said lands, and contrary to the laws under which the same was made, and that the said lots 22, 23 and 24 of the said city were, exclusive of lengthening by bends and angles in "E" street, normally of the length of 50 feet and that recent buildings erected in block 23 thereof, are to that length and show the actual use and occupancy thereof.

That the premises occupied by John M. Fix and his predecessors in interest extend northward, to the line of "D" street as the
42 same actually existed, and in a line with the line of the lots owned and possessed by these defendants John Q. Moxley and Louise Squier to-wit, lots 1, 2 and 3 of the said block 24, as heretofore set out for the true extent and area thereof.

Wherefore the answering defendants pray that the plaintiff take nothing by his said suit and that the same be dismissed with costs. And for proper relief.

I. N. SMITH,
Residing at Lewiston, Idaho, Attorney for Defendants.

Duly verified:
Filed this 18th day of October, 1905.

J. R. LYDON, *Clerk*,
By GEO. E. ERB, *Deputy*.

Findings of Fact.

This cause came on regularly for hearing in the above entitled court in open court, the 18th day of October, A. D., 1905, the plaintiff appearing in person and by his attorney Ben F. Tweedy, Esq., and the defendants appearing in person and by their attorney I. N. Smith and thereupon, evidence pro and con, for the respective parties was adduced, documents introduced, and after the consideration of the said evidence, and the arguments of counsel pro
43 and con, on the law governing the facts and evidence, the court finds the following facts:

1. That at the times stated in the complaint, the plaintiff Matthew Scully was, and for about 20 years or more, last past, has been, the owner of those certain premises commonly known as and called lot six (6), block twenty-four (24), as shown on the survey and plat of Lewiston, Idaho, known as the E. B. True survey and plat, with its appurtenances.

2. That heretofore, about the year 1867, the predecessor in interest of Louise Squier, occupied what is now commonly known as and called lot two (2), block twenty-four (24) as shown by the said plat of E. B. True of the city of Lewiston, Idaho, and erected thereon a building which occupied lands of the dimensions of twenty-five

(25) feet on "E" or Montgomery or Main street, in the said city of Lewiston, and fifty (50) feet north to "D" street, therein, and that in the year 1868, Hazen Spuier, became the owner of an undivided one-half thereof, and thereafter by mesne conveyance, the defendant Louise Squier became the owner in fee thereof, and is now such owner. That the said building at all times covered the lands
44 of the size and dimensions shown herein, and the lot which was covered thereby, is commonly known as and called lot two (2), block twenty-four (24), of the city of Lewiston, according to the survey and plat referred to above.

3. That in the year 1871, the defendant John Q. Moxley, purchased of any from M. A. Kelly, that certain lot of land known as and commonly called lot three (3), block twenty-four (24), of the city of Lewiston, and that the said lot at the time of the purchase thereof by him, was then occupied and of the size of twenty-five (25) feet frontage on "E" or Main or Montgomery street in said city and was fifty (50) feet in length, north, to the south line of "D" street as the same was then used and in existence, and that the said lot, of the size given, was actually occupied by buildings and appurtenances, from thence, hitherto, and was in the possession of the said defendant John Q. Moxley, whose occupancy extended over and covered the lot of the size stated.

4. That prior to the original survey by E. B. True, hereafter called the "True Survey," the predecessors in interest of John Q. Moxley occupied and actually claimed, all those certain lots, pieces and parcels of land, known as and commonly called lots four
45 (4) and five (5) of the city of Lewiston, in block twenty-four (24) thereof, and that since prior to the said survey of E. B. True, and thence hitherto, the said lots have been actually occupied, claimed and used by the said John M. Fix and his predecessors in interest, and that the same extended out to the line now claimed by him as his north property line, the same being the south line of "D" street as established by user, and as fixed by occupancy of the premises above described, which occupancy ante-dates the survey by E. B. True, referred to above and hereafter stated.

5. That for more than 30 years last past, the defendants and their predecessors in interest have been in the continuous, open, exclusive, notorious, peaceable, visible and acquiesced in, possession and occupancy of the premises which they claim in this cause, and have been exercising rights of ownership therein, and, have, for 30 years last past, been unmolested in their claims by the city of Lewiston, and that the predecessors in interest of the said Matthew Scully as well as the said Matthew Scully, have acquiesced in such ownership and occupancy of the said defendants and their predecessors in interest, up to within the time embraced since the commencement of
46 this action, and shortly prior thereto, when Matthew Scully set forth his claims, as stated in the complaint. That up to within the period of time at which Matthew Scully erected his new building on what is commonly known as and called lot 6, block 24, city of Lewiston, Idaho,—the said Matthew Scully and his predeces-

sors in interest, maintained, occupied and claimed, property rights extending out to the line which the defendants have at all times claimed and now claim, is the south line of "D" street in the city of Lewiston, and which is the south line thereof, as established by user.

6. That the city of Lewiston was incorporated in the year 1863, and thereafter and thence hitherto, has maintained, and prior to the making of the survey thereof by E. B. True, did maintain, a municipal government.

7. That Levi Ankeny, on November 21, 1871, filed the declaratory statement No. 39, in U. S. Land Office at Lewiston, Idaho, claiming the settlement of the said city in 1861, and that such application was made by him, as mayor, in trust for the benefit of the inhabitants of the said city of Lewiston; that thereafter, June 6th, 1874,
47 cash entry therefor, was made by Henry W. Stainton who was then the mayor of the said city and who made the entry of said lands described in the trust patent to him, in trust for the inhabitants of the city of Lewiston, as their several interests may appear, as provided by law.

8. That thereafter, the said mayor, as trustee, received patent for the lands involved herein, and the same was recorded July 16th, 1875, and is now of record in the office of the county recorder of Nez Perce county, Idaho; that E. B. True was employed as the official surveyor of the city of Lewiston, Idaho, and on June 22nd, 1875, made and delivered to the mayor trustee, a plat of the said city—the patent to the mayor bears date April 10, 1875.

9. That at the time of the making of said survey, the defendants or their predecessors in interest, were in the open, continuous, visible, exclusive, notorious and peaceable possession of the land involved herein, and that no part of the lands occupied by them had ever been used as a street nor have any part of such premises yet, been used as a street or dedicated to that purpose.

10. That in establishing the south line of said D street,
48 the surveyor in delineating the same, in making his field notes thereof, and in tracing the same, paid no regard to the occupancy of the premises then occupied along the south side of said "D" street, nor did the said plat or the field notes of the said surveyor, conform to the occupancy of the said land along the south side of "D" street in the city of Lewiston, nor did the said surveyor in marking the lots in blocks twenty-three (23) and twenty-four (24) and part of block twenty-two (22) make the streets conform to the occupancy of the lands, nor the street as theretofore established, nor did the said surveyor in establishing the lots with block 24, or in his field notes or plat thereof, conform to the actual size or occupancy of the lots as established by use, nor did his field notes conform to the lots as used or occupied, nor did his plat conform to the established street line, nor the size of the lots as established by user and occupancy. That in block 24—the notes and measurements thereof, show the same to be 200 feet in length on the south side of "D" street, while the foot frontage of lots as stated by said surveyor, show only 197 feet along said line; that the periph-y of

the said block is incorrectly stated in the field notes and
49 angles and deflections, as therein stated, and that it is impossible to start at any point in said block 24, and make the periph-y thereof, according to the said field notes, and come out at the place of commencement.

11. That according to the field notes and the plat and the survey of E. B. True,—the said survey and plat interfered with and ran through buildings then in the actual use and occupancy of the claimants of land, and cut off approximately four feet from the north end of buildings then standing and in actual use and occupancy of *bona fide* claimants thereof, in blocks twenty-three and twenty-four of the city of Lewiston, and failed to conform to the use and occupation thereof; that the lots in question are some of the lots on which the said plat and survey cut-off approximately, four feet, from the north end of said lots, and that at the time of the making of said survey, such portions of said lots were then actually claimed, occupied and used by *bona fide* occupants and claimants thereof, and that the south line of "D" street as then established by user, was approximately four (4) feet north of the line originally shown on the E. B. True map of said city,
50 as being and constituting the south line of "D" street. That portion of said lots then used and occupied, which E. B. True included within the limits of "D" street as stated above, never at any time, were used or claimed as street; and that the city of Lewiston has not in any manner ever claimed the same as street or molested or attempted to molest either the defendants or their predecessors in interest, in their claim of absolute ownership in and to that strip of land last referred to, but that the said strip has at all times, been in the actual possession of the claimants thereof, who were the predecessors of, as well as, the defendants herein.

12. That shortly after the filing of the plat by E. B. True, as required by law, with the Mayor Trustee, applications for lands within blocks 23 and 24 were received by said Mayor Trustee, and that he executed to the *bona fide* occupants of lots, deeds, in accordance with their actual occupancy, notwithstanding the conflict of the said survey, therewith; that in block twenty-three (23) deeds were executed to John P. Vollmer calling for a lot fifty (50) feet in length north and south, which included part of the paper "D" street as drawn by said "E. B. True" but which deed was in accord-
ance with the use and occupancy of lands then possessed,
51 owned and claimed by John P. Vollmer; that likewise, deeds were executed and delivered to Lowenberg Bros. for lands within block twenty-three (23) of the city of Lewiston, notwithstanding the survey and plat of E. B. True and that such deeds were executed to conform with the actual use and occupancy of said lands; that in block twenty-four (24) deeds were executed and delivered to Wesley Mulkey, for lands known as lot one (1), block 24, which deed conformed to the actual use and occupancy of said lot, and not to the lot as described in the field notes and survey of E. B. True, nor as shown on his plat; that what is called lot two (2), block twenty-four, was deeded to Hazen Squier, and

such deed was for the lot as it was actually possessed and owned and then was covered by a building; that deed to lot three (3) of block 24, according to E. B. True's survey, with an amendment, was executed and delivered to defendant J. Q. Moxley, and all such deeds were so delivered prior to the recordation of the said plat. That all said deeds named and mentioned, conveyed lots which were in length fifty (50) feet north and south, whereas, the survey of E. B. True, showed them to be or claimed them to be shorter
52 than 50 feet by approximately four (4) feet.

13. That thereafter, and prior to the filing of the said map or plat of E. B. True, the same was amended in many particulars and that such amendments are shown on said plat by red lines; that the south line of "D" street as originally shown on said plat, is shown by a black line, and that north of the same, there is placed a red line, both on the original and on the recorded copy thereof; that in the deed to John Q. Moxley of what is called lot three (3), block twenty four (24), is a recital of a conveyance of said lot three, block twenty-four "with an amendment;" and that the city of Lewiston, with full knowledge of the facts set forth, and of the claim of the predecessors in interest of the defendants of the location of the correct line of "D" street, established by use and occupancy as the south line of "D" street, has never at any time molested or attempted to molest the defendants or their predecessors in interest, in their rights to the said property claimed by them, nor has it ever claimed the same as street, nor has such portion ever been used as street; but that the said city of Lewiston, with
53 knowledge of the facts, has acquiesced in the user thereof as stated, and has accepted the south line of "D" street as the line established by user, and has accepted the lots referred to as extending to the south line thereof, as claimed and as heretofore set out, and has permitted and not prevented, but acquiesced in, the erection and construction of large and valuable buildings, extending to the south line of "D" street as established, which buildings are located in part of block twenty-two (22), all of block twenty-three (23) except one lot thereof, on which is now located a wooden building which was erected in 1868, and which was standing when the survey of E. B. True was made, and which wooden building was then in the same position it is now and occupied the same amount of ground; and that the said city has permitted the construction of buildings on lots with block 24, extending out to the line now claimed by defendants,—the same being the line which they and their predecessors have alway- so occupied out to, as the correct south line of said "D" street; that among the buildings now standing on the lots as formerly claimed and possessed and occupied by *bona fide* occupants thereof, whose occupancy conflicted with the paper street as drawn by E. B. True, are structures which cost many
54 thousands of dollars and include the best known business structures, and the most valuable ones, within the city of Lewiston; that the south line of "D" street as drawn and shown on paper by E. B. True, in his original plat, cuts off approximately four (4) feet from all of block twenty-three, all of block twenty-

four and part of block twenty-two (22), of the city of Lewiston, the same being, so far as the lands in controversy are concerned, part of the lots commonly known as and called lots two (2), three (3), four (4), five (5), of block twenty-four, of the city of Lewiston, Idaho.

14. That the defendants Louise Squier, John M. Fix and John Q. Moxley, are, individually and not collectively, erecting modern business structures on their said lots—the same being three stories in height, and none of said defendants are claiming any lands which was not heretofore claimed and occupied and possessed by them and their predecessors in interest, as hereinbefore stated, with full knowledge, consent and acquiescence on the part of the city of Lewiston, and that the buildings as constructing by them do not extend beyond the lines of their possessions and occupancy, as hereinbefore stated, but are wholly and entirely in con-
55 formity therewith.

15. That the city of Lewiston has never objected to nor interfered with such occupancy, possession and ownership; that the predecessors of Matthew Scully in the ownership of what is called lot six (6), block twenty-four, as well as the said Matthew Scully, have, for a period of twenty years, next prior to the erection of the Scully block now standing, occupied practically, out to the line as claimed and as established by user, as the correct south line of "D" street; that immediately west of Matthew Scully, in block 24, is the old Grostein building, which has been standing for approximately 21 years, and that the same is much farther out to the north, than the line shown by E. B. True, as the south line of "D" street, and that said building is practically in conformity with the occupancy and use of the premises on which it stands, as the same existed prior to the survey of E. B. True.

16. That there is no evidence to show that the officers of the city of Lewiston have ever been requested by Matthew Scully or his predecessors in interest, to have "D" street opened, in accordance with the alleged survey and plat of E. B. True, nor is there any evidence to show that the officers of the city of Lewiston
56 have refused or failed to exercise their powers in this regard, nor that they have acted collusively in any manner with any person, of or concerning the establishment of the south line of "D" street.

17. That the plaintiff Matthew Scully, after having, through his predecessors in interest, held the occupancy of lot 6, block 24, practically out to the line claimed by defendants, for a period extending from prior to the E. B. True survey, to the date of the erection of his new building in existence now, and has voluntarily and without request from the city of Lewiston or any person whomsoever, but with full knowledge of his rights, set his building in, approximately four feet, from the south line of "D" street as established by user, and from the north line of the premises heretofore held and occupied and claimed and possessed by himself and his predecessors in interest.

18. That the plaintiff is not damaged in any manner by the

erection of the buildings by the defendants or any or either of them and that he has suffered no special damage whatever, nor does he now suffer any special damage whatever. That at the time of the erection of the present building by Matthew Scully,
57 on what is known as lot 6, block 24, he voluntarily set the same back about four feet from the line which he had theretofore occupied, and at the time of setting the same back, there was then standing the old Fix building which covered the ground now covered by the proposed and new Fix buildings, and also was standing, the Grostein building which still stands, both of which were large two story wooden buildings, which were in height, such as to reach to or above the windows of the third floor or story of the Scully building, and had so stood for many years, at the time of the erection of the Scully building. That Matthey Scully has failed to show that he had any ancient lights or rights to air or view, which have in any way been interfered with by defendants or any or either of them, and that the plaintiff failed to show that the rental value of his building or any part thereof, would in any manner be impaired or lessened, by any act of defendants or any or either of them.

19. That the plaintiff stated that whatever damage he had suffered was measurable in money.

58 *Conclusions of Law.*

As conclusions of law from the above and foregoing facts, the court concludes:

—. That the complainant is devoid of equity, and without standing in a court of equity.

2. That he has no such interest as will permit him to maintain this action.

3. That the defendants are entitled to judgment and decree in their favor, and for costs of suit.

Dated this the 20th of November, A. D., 1905.

EDGAR C. STEELE,
District Judge Who Tried said Cause.

Filed 13th day of December, 1905.

J. R. LYDON, *Clerk,*
By GEO. E. ERB, *Deputy.*

Decree.

The Court, having heretofore rendered his findings of fact, and conclusions of law herein, now, based thereon, renders his decree, as follows:

It is now therefore considered, ordered, adjudged and decreed, that this action be and the same hereby is, dismissed and

It is further considered, ordered, adjudged and decreed, that defendants Louise Squier, John Q. Moxley and John M. Fix, have

and recover of and from the plaintiff Matthew Scully, their
59 costs and disbursements herein incurred, taxed at the sum of $—.

Done and dated in open court, this the 20th day of November, A. D., 1905.

EDGAR C. STEELE,
District Judge Who Tried said Cause.

Filed this 13th day of December, 1905.
J. R. LYDON, *Clerk,*
By GEO. E. ERB, *Deputy.*

Docketed Volume 7, page 134, and entered in Volume G, page 255 of the Judgment Records books of the District Court of the Second Judicial District of Idaho, for Nez Perces county.

Notice of Motion for New Trial or Application.

You and each of you, defendants in the above entitled action, and I. N. Smith, your attorney, are notified that the plaintiff intends to move for a new trial in the above entitled action upon affidavits, records and files in the said action, the minutes of the court, a bill of exceptions and a statement of the case, and the grounds upon which the application for a new trial, or motion therefor, will be made, are as follows, to-wit:

First. Insufficiency of the evidence to justify the decision.
60 Second. That the decision is against law.
Third. Error of and in law, occurring at the trial and excepted to by the plaintiff.

BEN F. TWEEDY,
Attorney for Plaintiff.

Service of the within by copy accepted this 13th day of December, 1905.

I. N. SMITH,
Attorney for Defendants.

Filed this 13th day of December, 1905.
J. R. LYDON, *Clerk,*
By GEO. E. ERB, *Deputy.*

Order Overruling Motion for New Trial.

The motion for a new trial in the above entitled case being submitted by the parties, and the court having considered the same:

Now overrules the said motion for a new trial, to which ruling the plaintiff excepts and the exception is allowed.

Dated this 27th day of November, 1906.

EDGAR C. STEELE, *Judge.*

Filed this 27th day of November, 1906.
J. R. LYDON, *Clerk,*
By GEO. E. ERB, *Deputy.*

61 In the District Court of the Second Judicial District of the State of Idaho, in and for the County of Nez Perces.

MATTHEW SCULLY, Plaintiff,
vs.
JOHN M. FIX ET AL., Defendants.

Statement on Motion for New Trial.

Appearances:

For the Plaintiff: B. F. Tweedy, Esq.
For the Defendants: I. N. Smith, Esq.

The above entitled cause came on regularly for trial at Lewiston, Nez Perces county, Idaho, on the — day of September, 1905, before the Honorable Edgar C. Steele, District Judge, at the hour of 10 o'clock A. M., the parties plaintiff and defendant being personally present in open court, and represented by their respective counsels as aforesaid, whereupon the following proceedings were had and the following testimony adduced:

Stipulation Extending Time.

62 At this time it is stipulated and agreed by and between the respective parties hereto, that either party desiring to appeal from the judgment in the above entitled cause, may have sixty days from and after the filing of the judgment within which to prepare, serve and file a proposed statement of the case on motion for a new trial or on appeal said statement and exceptions therein contained to have the same force and effect as if taken and reduced to writing within the time allowed by statute; the opposite party to have 20 days within which to prepare, serve and file any amendment thereto.

GEORGE E. ERB, a witness called and sworn in behalf of the plaintiff, testified as follows:

My name is George E. Erb, I am chief deputy in the office of the clerk of the district court and *ex-officio* auditor and recorder of Nez Perces county, state of Idaho. As such deputy I have the custody of the records, plats, patents and deeds of said county. I turn to page 9, volume U, of patents, Nez Perces county, Idaho, and find a patent from the United States to Henry W. Stainton. The record is introduced in evidence and marked plaintiff's exhibit A. A copy of it is as follows:

63 *Land Patent Filed for Record June 11th, 1875, at 3 O'Clock P. M.*

United States of America
to
Henry W. Stainton.

Certificate No. 39.

The United States of America to all to whom these presents shall come, Greeting:

Whereas Henry W. Stainton, Mayor of the City of Lewiston, Nez Perces county, Idaho Territory, in trust for the several use and benefit of the inhabitants of the said city according to their respective interests by virtue of the Act of Congress of March 3rd, 1867, entitled "An Act for the Relief of the Inhabitants of Cities and Towns Upon the Public Lands," has deposited in the general land office of the United States, a certificate of the register of the land office at Lewiston, Idaho Territory, whereby it appears that full payment has been made by the said Henry W. Stainton, mayor as aforesaid, in trust as aforesaid according to the provisions of the Act of Congress of the 24th of April, 1820, entitled "An Act Making Further Provision for the sale of the Public Lands" for the lots numbered three and four of section six in township thirty-five, north of range five west, and the lots numbered one and two of section one in township
64 thirty-five north of range six west and the south half of the southwest quarter, and the lots numbered five and seven of section thirty-one in township thirty-six north of range five west, and the east half of the southeast quarter and the lots numbered one and two (except the grant to the heirs of Robert Newell, deceased, of five acres and five-hundredths of an acre) 3 and 4 of section 36 in township thirty-six, north of range six west, in the district of lands subject to sale at Lewiston, Idaho Territory, containing five hundred and sixty-one acres and thirty one-hundredths of an acre according to the official plat of the survey of the said lands returned to the General Land Office by the Surveyor General, which said tracts have been purchased by the said Henry W. Stainton, mayor as aforesaid in trust as aforesaid.

Now know ye that the United States of America is consideration of the premises and in conformity with the several acts of Congress in such case made and provided have given and granted and by these presents do give and grant unto the said Henry W. Stainton, mayor as aforesaid in trust as aforesaid and to his successors the said tracts above described to have and to hold the same together with
65 all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said Henry W. Stanton, mayor as aforesaid and to his successors and assigns, in trust as aforesaid.

(No title shall be hereby acquired to any mine of gold, silver, cin-

nabar or copper or to any valid mining claim or possession held under existing laws of Congress.)

In testimony whereof I Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Givn under my hand at the City of Washington, the tenth day of April, in the year of Our Lord One Thousand Eight Hundred and Seventy-Five and of the Independence of the United States the Ninety-Ninth.

By the President, U. S. GRANT,
By S. A. WILLIAMSON,
Secretary.

(United States General Land Office.)
Recorded Vol. 1, page 25, L. R. Lippincott.
Recorder of the General Land Office.
Recorded at the request of Henry W. Stanton, July 16th, 1875, at 11 o'clock A. M.

I hereby certify the foregoing instrument of writing to
66 be a true copy of the original now on file in my office for record.

W. P. HUNT,
County Recorder.

STATE OF IDAHO, *County of Nez Perces, ss:*

I, J. R. Lydon, county recorder of Nez Perces county, Idaho, do hereby certify the above and foregoing to be a full, true and correct copy of a patent from the United States to Henry W. Stanton, mayor as the same appears of record at pages 9, 10 and 11 of volume U of records of patents of Nez Perces county, Idaho, now in my office and under my custody and control and of the whole thereof and of all endorsements thereon.

In witness whereof I have hereunto set my hand and affixed my official seal on this 23rd day of December, A. D., 1905.

J. R. LYDON,
County Recorder,
[SEAL.] By GEO. E. ERB, *Deputy.*

Endorsed: Plaintiff's Ex. A.

WITNESS: I have the record of the original plat of the City of Lewiston as made by E. B. True as it was made in the office of the county recorder. These plats are not to be referred to by volume and page. When I first became acquainted with the office of the county recorder of this county, that is of course of this county, these
67 plats were simply fastened together with a string a volume, and not pages, afterward they were becoming so abused they were put in this stub book and since then a great many have been recopied. These are the two original sheets which are the original record of that plat, but I cannot refer to it as a volume or page, but

these two are the original record of that plat as recorded in the office of Nez Perces county, Idaho.

COURT: The defendant I understand makes that,——

WITNESS: The original plat is brought to the recorder and he makes a copy of it in the plat book. We have a regular plat book by page and number, but in the early years they weren't kept that way, they were fastened together by strings and this is the original copy which the auditor made of the plat comprising two sheets.

Mr. TWEEDY: I would like to introduce the plat of the City of Lewiston as made by E. B. True and approved by Henry W. Stainton and ask the privilege to supply the record with this map, as shown in the auditor's office of Nez Perces county.

SMITH: Objected to as incompetent, irrelevant and immaterial upon the ground that the original is in existence and they have not accounted for not having the original here.

68

Overruled. Defendants except.

The defendants further object to the introduction of the document for the reason that it shows upon its fact it has been altered and amended and that the plaintiff has not accounted for the alterations and amendments, and it is the duty of the person introducing the document that has been amended or altered to account for the amendments or alterations.

Objections overruled. Defendants except to the ruling.

The document with its record was admitted, and is hereto attached and made a part hereof.

(Here follows map marked p. 68*a*.)

MAPS

TOO

LARGE

FOR

FILMING

WITNESS: I have the field notes of block 24; I have the record of the field notes of block 24; I have the records of blocks 22, 23 and 24 and the block of Joe Alexander's store is block 25. I find the field notes of block 24 at page 17 of this book of field notes of the City of Lewiston.

Document objected to as not being the original nor has the original been proved nor its loss been proved; on the further ground that the field notes of block 24 show upon their face that they
69 are incorrect and that the field notes of block 24 do not establish the line of D street.

COURT: You just bring the original field notes.

WITNESS: I don't have the least idea of how it was made at the present time, we have nothing whatever to do with the field notes. I presume these were recorded by copying the original field notes.

COURT: I don't know of anything that ever required the field notes to be recorded. The City of Lewiston ought to keep the field notes, hadn't they?

WITNESS: I would like to make a statement. I don't believe I am the custodian of this book. I don't believe the book is the property of Nez Perces county. I have always believed this belonged to the city of Lewiston. I don't believe we were ever called on to keep such books as this, and I have never believed this belonged to the county office. I think it is a part of the city records but it has been here for two years.

COURT: It is no part of the county records,

WITNESS: My personal opinion is it is a part of the city records.

COURT: Isn't this a separate corporation, and wouldn't the city keep the original?

70 Mr. TWEEDY: It would have the original, but it should place this of record, so the public will know. This is placed of record for preservation in case the other was lost.

WITNESS: I don't desire to be misunderstood; this is recorded, but I don't know as it is a record such as is required by law.

Mr. SMITH: It requires the plat to be recorded only.

WITNESS: This is a record made by the county recorder.

COURT: Mr. Tweedy, pass this for the present.

Witness continues: At book 7 of deeds at page 63 of the records of our office is a record of the recorder's office of Nez Perces county, Idaho. (Thereupon the document referred to was offered and admitted in evidence by copy and is as follows, to-wit:

Deed to James Kearney.

Dated October 14th, 1875.

Filed for Record, October 15th, 1875, at 7 o'clock p. m.

Know all men by these presents;

That, Whereas on the tenth day of April, A. D., one thousand eight hundred and seventy-five, a patent was duly issued by the

United States to me, Henry W. Stainton, mayor of the city
71 of Lewiston, Nez Perces county, Idaho Territory, in trust for the several use and benefit of the inhabitants of the said city, according to their respective interests by virtue of the act of congress of March 3d, 1867, entitled, "An Act for the Relief of the Inhabitants of Cities and Towns Upon the Public Lands."

And whereas, an act of the legislative assembly of the territory of Idaho, approved January 8th, A. D., 1873, entitled "An Act to Provide for the Survey, Platting and Disposal of the Land in the City of Lewiston, Nez Perces County, Idaho Territory, pursuant to the United States Statutes made and provided," directs and authorizes me, the said mayor of the said city of Lewiston, under the provisions and limitations of said act to make and deliver to the *bona fide* occupants of such portions of the said land described in said patent, who may be entitled thereto good and sufficient deeds of conveyance in fee simple according to their respective interests.

In consideration of $1.78-100 one dollar and seventy-eight cents, *dollars* to me in hand paid and received and by virtue of the authority above cited, I the said Henry W. Stainton, as mayor
72 of the said city of Lewiston, have this day granted, bargained, sold, aliened, remised, released, conveyed and confirmed and by these presents do grant, bargain, sell, alien, remise, convey and confirm unto James Kearney, of the city of Lewiston, Idaho Territory, his heirs and assigns forever, a portion of lot No. (5) five, of block No. (24), according to the plat of the said city.

Said lot comprises in aggregate 498 feet.

Together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining.

To have and to hold unto him the said James Kearney, of the city of Lewiston, Idaho Territory, his heirs and assigns forever.

In witness whereof, I, the said Henry W. Stainton, mayor as aforesaid, on this fourteenth day of October, A. D., one thousand eight hundred and seventy-five, hereunto set my hand and seal.

[SEAL.] HENRY W. STAINTON, [SEAL.]
Mayor of the City of Lewiston, Nez Perces County, Idaho Territory.

Signed, sealed and delivered in the presence of
J. M. HOWE.
[SEAL.]
EDWARD PEARCEY.

73 TERRITORY OF IDAHO, *County of Nez Perces, ss:*

On this 14th day of October, A. D., 1875, personally appeared before me a justice of the peace in and for the said county and territory, Henry W. Stainton, personally known to me to be the person who executed the foregoing conveyance and acknowledged that he in his official — as mayor of the city of Lewiston, I. T., executed the said conveyance freely and voluntarily and for the uses and purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed my seal this day and year in this certificate above written.

D. J. WARNER. [L. S.]

Recorded at the request of James Kearney, November 13th, 1875, at 2 o'clock p. m.

I hereby certify *that* the foregoing instrument of writing to be a true copy of the original now on file in my office for record.

W. P. HUNT, *County Recorder.*

STATE OF IDAHO, *County of Nez Perces, ss:*

I, J. R. Lydon, county recorder of Nez Perces county, Idaho, do hereby certify the above and foregoing to be a full, true and correct copy of the original deed from Henry W. Stainton, mayor, to James Kearney, as the same appears of the record at pages
74 63, 64 and 65 of volume T of deeds of Nez Perces county, Idaho, now in my office and under my custody and control and of the whole thereof and of all endorsements thereon.

In witness whereof I have hereunto set my hand and official seal on this 23rd day of December, A. D., 1905.

J. R. LYDON,
County Recorder,
[SEAL.] By GEO. E. ERB, *Deputy.*

Endorsed: Plaintiff's Exhibit D.

Witness continues: At page 75 of Book T of deeds I find a deed from Henry W. Stainton, mayor, to John Q. Moxley, which deed is as follows, to-wit:

Deed to John Q. Moxley.

Filed for Record November 20th, 1875, at 11 o'clock a. m.

Know all men by these presents, that whereas on the tenth day of April, A. D., one thousand eight hundred and seventy-five, a patent was duly issued by the United States to me Henry W. Stainton, mayor of the city of Lewiston, Nez Perces county, Idaho Territory, in trust for the several use and benefit of the inhabitants
75 of the said city according to their respective interests, by virtue of the Act of Congress of March 3rd, 1867, entitled "An Act for the Relief of the Inhabitants of cities and towns upon the Public Lands." And whereas an act of the Legislative Assembly of the Territory of Idaho, approved January 8th, A. D., 1873, entitled, "An Act to Provide for the Survey, Platting and Disposal of the Lands in the City of Lewiston, Nez Perces County, Idaho Territory, Pursuant to the United States Statutes Made and Provided," directs and authorizes me, the said mayor of the said city of Lewiston, under the provisions and limitations of the said act, to make and deliver to the *bona fide* occupants of such portions of the said land described in said patent, who may be entitled thereto, good and suf-

ficient deeds of conveyance in fee simple according to their respective interests.

In consideration of two dollars and 27-100 dollars to me in hand paid and received and by virtue of the authority above cited, I, the said Henry W. Stainton, as mayor of the said city of Lewiston, have this day granted, bargained, sold, aliened, remised, conveyed and confirmed and by these presents do grant, bargain, sell, alien, remise, convey and confirm unto John Q. Moxley, of the city
76 of Lewiston, Idaho Territory, his heirs and assigns forever, all of lot No. (3) three, of block No. (24), with an amendment according to the plats of the said city. The said lot comprises an area (1136 feet) one thousand one hundred and thirty-six feet.

Together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining.

To have and to hold, unto him, the said John Q. Moxley, of the city of Lewiston, Idaho Territory.

In witness whereof I, the said Henry W. Stainton, mayor as aforesaid, on this twenty-third day of September, A. D., one thousand eight hundred and seventy-five, hereunto set my hand and seal.

HENRY W. STAINTON, [SEAL.]
Mayor of the City of Lewiston, Nez Perces County, Idaho Territory.

[SEAL.]

Signed, sealed and delivered in the presence of
D. J. WARNER.
C. E. SPAULDING.

TERRITORY OF IDAHO, *County of Nez Perces, ss:*

On this sixteenth day of November, A. D., 1875, personally appeared before me, Justice of the Peace in and for said county
77 and territory, Henry W. Stainton, personally known to me to be the person who executed the foregoing conveyance and acknowledged that he in his official capacity as mayor of Lewiston, I. T., executed the said conveyance freely and voluntarily and for the uses and purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed my seal this the day and year in this certificate above written.

D. J. WARNER, *J. P.* [L. S.]

Recorded at the request of J. Q. Moxley, December 14th, 1875, at 12 o'clock M.

I hereby certify the foregoing instrument of writing to be a true copy of the original now on file in my office for record.

W. P. HUNT,
County Recorder.

STATE OF IDAHO, *County of Nez Perces, ss:*

I, J. R. Lydon, county recorder of the county of Nez Perces, state of Idaho, do hereby certify the above and foregoing to be a

full, true and correct copy of the original deed from Henry W. Stainton, mayor, to John Q. Moxley, as the same now appears of record at pages 75, 76 and 77 of volume T of deeds of Nez
78 Perces county, Idaho, now in my office and under my custody and control.

In witness whereof I have hereunto set my hand and affixed my official seal on this 23rd day of December, A. D., 1905.

J. R. LYDON,
County Recorder,
[SEAL.] By GEO. E. ERB, *Deputy.*

Endorsed: Plaintiff's Exhibit F.

Witness continues: At page 112 book T of deeds, the number of the lot affected is lot I of block 24 and Lot 25 of block 30. Lot I of block 24 is the one that Moxley has built his brick on.

Mr. TWEEDY: That is not in question but I will offer that in evidence for the purpose of showing the deeds were given according to the plat of the entire block.

Witness continues: At page 112 of book T, I find a deed from Henry W. Stainton, mayor, to Wesley Mulkey, the said deed is as follows, to-wit:

Deed to Wesley Mulkey.

Dated December 11th, 1875; Filed for Record December 11th, 1875, at 2 o'clock p. m.

Know all men by these presents that:

Whereas on the tenth day of April, A. D., one thousand
79 eight hundred and seventy-five, a patent was duly issued by the United States to me, Henry W. Stainton, mayor of the city of Lewiston, Nez Perces county, Idaho Territory, in trust for the several use and benefit of the inhabitants of the said city according to their respective interests, by virtue of the act of congress of March 3d, 1867, entitled "An Act for the Relief of the Inhabitants of Cities and Towns upon the Public Lands," and whereas an act of the legislative assembly of the Territory of Idaho, approved January 8th, 1873, entitled "An Act to Provide for the Survey, Platting and Disposal of the Land in the city of Lewiston, Nez Perces county, Idaho Territory, Pursuant to the United States Statutes Made and Provided," directs and authorizes me, the said mayor of said city of Lewiston under the provisions and limitations of said act to make and deliver to the *bona fide* occupants of such portions of the said land described in said patent who may be entitled thereto, good and sufficient deeds of conveyance in fee simple according to their respective interests.

In consideration of ($55.00) fifty-five dollars to me in hand paid
and received, and by virtue of the authority above cited, I,
80 the said Henry W. Stainton, as mayor of the said city of Lewiston, have this day granted, bargained, sold, aliened,

remised, released, conveyed and confirmed and by these presents do grant, bargain, sell, alien, remise, convey and confirm unto Wesley Mulkey, of the city of Lewiston, Idaho Territory, his heirs and assigns forever, all of lots Nos. (1), (4), (5), one, four, five, of block No. (16), and lot No. (1), of block No. (24) twenty-four and lot No. (5), five, of block (30) thirty according to the plats of said city, said lots No. (1), (4), (5), of block No. (16) contains in area 15200 feet; lot No. (1) of block (24) contains an area of 1257 feet and lot No. (5) of block No. (30) contains an area of 10000 feet fronting on E street and 18828 feet in acres making in the aggregate 45285 feet.

Together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining.

To have and to hold, unto him the said Wesley Mulkey, of the city of Lewiston, Idaho Territory, his heirs and assigns forever.

In witness whereof I the said Henry W. Stainton, mayor as aforesaid, on this eleventh day of December, A. D., one thousand
81 eight hundred and seventy-five, hereunto set my hand and seal.

[SEAL.] HENRY W. STAINTON,
Mayor of the City of Lewiston, Nez Perces County, Idaho Territory.

[SEAL.]

Signed, sealed and delivered in the presence of
JOEL D. MARTIN.
CHARLES C. BUNNELL.

TERRITORY OF IDAHO, *County of Nez Perces, ss:*

On this eleventh (11th) day of December, A. D., 1875, personally appeared before me, a Justice of the Peace in and for said county and territory, Henry W. Stainton, personally known to me to be the person who executed the foregoing conveyance and acknowledged that he in his official capacity as mayor of the city of Lewiston, I. T., executed the said conveyance freely and voluntarily and for the uses and purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed my seal this the day and year in this certificate above written.

D. J. WARNER, *J. P.* [L. S.]

Recorded at the request of W. Mulkey, December 20th, 1875, at 5 o'clock p. m.

I hereby certify the foregoing instrument of writing to be
82 a true copy of the original now on file in my office for record.

W. P. HUNT,
County Recorder.

STATE OF IDAHO, *County of Nez Perces, ss:*

I, J. R. Lydon, county Recorder of Nez Perces county, Idaho, do hereby certify the above and foregoing to be a full and true and

correct copy of a deed from Henry W. Stainton, mayor, to Wesley Mulkey as the same now appears of record at pages 112, 113 and 114 of volume T of record of deeds of Nez Perces county, Idaho, in my office and under my custody and control, and of the whole thereof and of all endorsements thereon.

In witness whereof I have hereunto set my hand and official seal on this the 23rd day of December, A. D., 1905.

J. R. LYDON,
County Recorder,
[SEAL.] By GEO. E. ERB, *Deputy.*

Endorsed: Plaintiff's Exhibit G.

Witness continues: At page 370 book T, of deeds—I have it—. Thereupon there was offered and received in evidence certified copy, marked exhibit H, of deed from the city to James Mc-
83 Grane, which is as follows, to-wit:

Deed to James McGrane.

Dated Apri- 3rd, 1876, Filed for Record April 28th, 1877, at 11 o'clock a. m.

Know all men by these presents:

That whereas, on the tenth day of April, A. D., one thousand eight hundred and seventy-five, a patent was issued by the United States to me, Henry W. Stainton, mayor of the city of Lewiston, Nez Perces county, Idaho territory, in trust for the several use- and benefit- of the inhabitants of the said city according to their respective interests, by virtue of the act of Congress of March 3rd, 1867, entitled, "An Act for the Relief of the Inhabitants of the Cities and Towns Upon the Public Lands."

And whereas an act of the legislative assembly of the Territory of Idaho, approved January 8th, A. D., 1873, entitled "An Act to Provide for the Survey, Platting and Disposal of the Land of the City of Lewiston, Nez Perces county, Idaho territory, Pursuant to the United States Statutes made and provided," directs and authorizes me, the said mayor of said city of Lewiston under the provisions and limitations of said act to make and deliver to the *bona fide*
84 occupants of such portions of the said land described in said patent, who may be entitled thereto, good and sufficient deeds of conveyance in fee simple according to their respective interests.

In consideration of $11.45, eleven 45-100 dollars to me in hand paid and received and by virtue of the authority above cited, I the said Henry W. Stainton, as mayor of the said city of Lewiston, have this day granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, remise, convey and confirm unto James McGrane, his heirs and assigns forever all of lot No. (6) six of block No. 24 and fraction of Lot No. 26 of block No. (29) twenty-nine, according to the plats of the said city.

Lot No. (6) of block (24) fronts on E street 22½ feet, and contains in the aggregate 1506 feet and fraction lot (26) block 29 fronts on E street 63 feet containing 3150 feet of 50 x 100 and in acres 15000 feet.

Together with all and singular the tenements hereditaments and appurtenances thereto belonging or in anywise pertaining.

To have and to hold unto him, the said James McGrane,
85 of the city of Lewiston, Idaho territory, his heirs and assigns forever.

In witness whereof I, the said Henry W. Stainton, mayor as aforesaid, on this 3rd day of April, A. D., one thousand eight hundred and seventy-six, hereunto set my hand and seal.

HENRY W. STAINTON, [SEAL.]
Mayor of the City of Lewiston, Nez Perces County, Idaho Territory.

Signed, Sealed and Delivered in the presence of

A. GILLMAN.
D. J. WARNER.

[SEAL.]

TERRITORY OF IDAHO, *County of Nez Perces, ss:*

On this 4th day of April, A. D., 1876, personally appeared before me, a Justice of the Peace in and for said county and territory, Henry W. Stainton, personally known to me to be the person who executed the foregoing conveyance and acknowledged that he in his official capacity as mayor of the city of Lewiston, I. T., executed the said conveyance freely and voluntarily and for the uses and purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed my seal, this the day and year in this certificate above written.
86 D. J. WARNER, *J. P.* [SEAL.]

Recorded at the request of James McGrane, May 1st, 1877, at 10 o'clock A. M.

I hereby certify the foregoing instrument of writing to be a true copy of the original now on file in my office for record.

THOS. HUDSON,
County Recorder.

STATE OF IDAHO, *County of Nez Perces, ss:*

I, J. R. Lydon, county recorder of the county of Nez Perces, state of Idaho, do hereby certify the foregoing to be a full, true and correct copy of the original deed from Henry W. Stainton, mayor, to James McGrane, as the same appears of record at pages 370, 371 and 372 of volume T of deeds of Nez Perces county, Idaho, in my office and under my custody and control.

In witness whereof I have hereunto set my hand and affixed my official seal on this 23rd day of December, A. D., 1905.

J. R. LYDON,
County Recorder,
[SEAL.] By GEO. E. ERB, *Deputy.*

Endorsed: Plaintiff's Exhibit H.

Witness continues: At page 469 of book 27 of deeds——

TWEEDY: I will offer this.

87 (The objection to this deed was that it did not affect any property on controversy, otherwise the deed was admitted without objection and it is as follows, to-wit:

H. W. Stainton, Mayor,
to
C. A. Thatcher.

Know all men by these presents that:

Whereas on the tenth day of April, A. D. one thousand eight hundred and seventy-five, a patent was duly issued by the United States to me, Henry W. Stainton, mayor of the city of Lewiston, Nez Perces county, Idaho territory, in trust for the several use- and benefit- of the inhabitants of the said city, according to their respective interests, by virtue of the Act of Congress of March 3rd, 1867, entitled, "An Act for the Relief of the Inhabitants of the Cities and Towns Upon the Public Lands."

And whereas, an act of the legislative assembly of the Territory of Idaho, approved January 8th, A. D., 1873 entitled, "An Act to Provide for the Survey, Platting and Disposal of the Land in the City of Lewiston, Nez Perces County, Idaho Territory, Pursuant to the United States Statutes Made and Provided," directs and authorizes me, the said mayor of said city of Lewiston, under the provisions and limitations of said act to make and deliver to the

88 *bona fide* occupants of such portions of the said land described in said patent who may be entitled thereto, good and sufficient deeds of conveyance in fee simple according to their respective interests:

In consideration of $212.11-100 two hundred twelve 11-100 dollars to me in hand paid and received, and by virtue of the authority above cited, I the said Henry W. Stainton as mayor of the said city of Lewiston, have this day granted, bargained, sold, aliened, remised, released, conveyed and confirmed and by these presents do grant, bargain, sell, alien, remise, convey and confirm unto Charles A. Thatcher, his heirs and assigns forever all of lot No. (24) twenty-four of block No. (29) twenty-nine, and lot No. (4) four of block No. (26) twenty-six, and lot No. (23) twenty-three of block No. 29 according to the plats of the said city; also lot No. (2) two of block (29) twenty-nine, lots No. 1, 8, 9, of block No. 17, lot (1) one of block No. (31), lot (3) of block (14) fourteen, lot No. (1) one of

block No. (15) fifteen, lot (7) seven of block No. (24), lot (2) of block No. (22) and part of lot (5) comprising 9 72-100 acres, all the lots excepting lot (5) are of the dimensions of 50 x 100 and comprise in the aggregate 82893 feet area, lot (5), 9 72-100
89 of acres.

Together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining.

To have and to hold unto him, the said Charles A. Thatcher, of the city of Lewiston, Idaho Territory, his heirs and assigns forever.

In witness whereof, I, the said Henry W. Stainton, mayor as aforesaid, on this fourth day of March, A. D., one thousand eight hundred and seventy-six, hereunto set my hand and seal.

HENRY W. STAINTON,
Mayor of the City of Lewiston, Nez Perces County, Idaho Territory.

(City of Lewiston, Idaho Territory, Incorporated Dec. 27, 1866.)

Signed and delivered in the presence of
D. J. WARNER.
GEO. H. ANDERSON.

TERRITORY OF IDAHO, *County of Nez Perces, ss:*

On this thirty-first (31) day of March, A. D., 1876, personally — before me, a justice of the peace in and for said county and territory, Henry W. Stainton personally known to me to be the person who executed the foregoing conveyance and acknowledged that he in his official capacity as mayor of the city of Lewiston, I.
90 T. executed the said conveyance freely and voluntarily and for the uses and purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed my seal this the day and year in this certificate above written.

[SEAL.] D. J. WARNER, *J. P.*

Recorded at the request of C. A. Thatcher March 4th, 1881, at 9 a. m. JOHN H. EVANS, *Recorder.*

STATE OF IDAHO, *County of Nez Perces, ss:*

I, J. R. Lydon, county recorder of the county of Nez Perces, state of Idaho, do hereby certify the above and foregoing to be a full, true and correct copy of the mayor's deed from Henry W. Stainton, mayor, to Charles A. Thatcher as the same appears of record at pages 469 and 470 of volume 27 of deeds records of said county, in my office and under my custody and control, and the whole thereof and of all endorsements thereon.

In witness whereof I have hereunto set my hand and affixed my official seal on this 23rd day of December, A. D., 1905.

J. R. LYDON,
[RECORDER'S SEAL.] *County Recorder,*
By GEO. E. ERB, *Deputy.*

91 Endorsed: Plaintiff's Exhibit 2-H.

Witness continues: Book 38 of deeds, page 174, I find a deed from Stainton, mayor, to Bunker Squires. Said deed was admitted and is in words and figures as follows, to-wit:

Plaintiff's Exhibit 1.

Henry W. Stainton, Mayor,
to
Bunker and Squires.

Know all men by these presents that:

Whereas on the tenth day of April, A. D., one thousand eight hundred and seventy-five, a patent was duly issued by the United States to me, Henry W. Stainton, mayor of the city of Lewiston, Nez Perces county, Idaho territory, in trust for the several use- and benefit of the inhabitants of the said city according to their respective interests by virtue of the act of Congress of March 3rd, 1867, entitled, "An Act for the Relief of the Inhabitants of the Cities and Towns Upon the Public Lands."

And whereas an act of the Legislative Assembly of the territory of Idaho, approved January 8th, A. D., 1873, entitled "An Act to Provide for the Survey, Platting and Disposal of the Land of the City of Lewiston, Nez Perces County, Idaho Territory, Pursuant to the United States Statutes Made and Provided," directs and au-
92 thorizes me, the said mayor of said city of Lewiston under the provisions and limitations of said act to make and deliver to the *bona fide* occupants of such portions of the said land described in said patent who may be entitled thereto, good and sufficient deeds of conveyance in fee simple according to their respective interests.

In consideration of $8.70-100 eight 70-100 dollars to me in hand paid and received and by virtue of the authority above cited, I, the said Henry W. Stainton, as mayor of the said city of Lewiston, have this day granted, bargained, sold, aliened, remised, released, conveyed and confirmed and by these presents do grant, bargain, sell, alien, remise, releas-, convey and confirm unto T. J. Bunker and Hazen Squires, their heirs and assigns forever all of lot No. (6) six of block No. 12, and lot No. (2) two of block No. (24) twenty-four and extension of 476 feet by 25 feet *t*in lot No. 2. according to the plats of said city.

Said lot 6 of blk 12 containing an area of.....3100 ft
Said lot 2 of blk 24 containing an area of.....1250 ft

Aggregate..... 4350 ft

Together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining.
93

To have and to hold unto them, the said Bunker and Squier of the said city of Lewiston, Idaho territory, their heirs and assigns forever.

In witness whereof I, the said Henry W. Stainton, mayor as aforesaid, on this 26th day of October, A. D., one thousand eight hundred and seventy-five, hereunto set my hand and seal.

HENRY W. STAINTON,
Mayor of the City of Lewiston, Nez Perces County, Idaho Territory.

Signed, sealed and delivered in the presence of

J. W. BERRYENRE.
GEO. H. ANDERSON.

TERRITORY OF IDAHO, *County of Nez Perces, ss:*

On this 26th day of October, A. D., 1875, personally appeared before me, a Justice of the Peace in and for the said county and territory, Henry W. Stainton, personally known to me to be the person who executed the foregoing conveyance and acknowledged that he, in his official capacity as mayor of the city of Lewiston, I. T., executed the said conveyance freely and voluntarily and for the uses and purposes therein expressed.

In witness whereof, I have set my hand and affixed my
94 seal this the day and year in this certificate above written.

D. J. WARNER, *J. P.* [L. S.]

Recorded at the request of H. Squier, October 20th, 1882, at 10 a. m.

JNO. H. EVANS,
County Recorder.

STATE OF IDAHO, *County of Nez Perces, ss:*

I, J. R. Lydon, county recorder of the county of Nez Perces, state of Idaho, do hereby certify the above and foregoing to be a full, true and correct copy of the deed from Henry W. Stainton, mayor, to T. J. Bunker and Hazen Squier as the same appears of record at pages 174 and 175 of volume 38 of deeds of Nez Perces county, Idaho, in my office and under my custody and control and of the whole thereof and all endorsements thereon.

In witness whereof I have hereunto set my hand and affixed my official seal on this 23rd day of December, 1905.

J. R. LYDON,
County Recorder,
[SEAL.] By GEO. E. ERB, *Deputy.*

Endorsed: Plaintiff's Exhibit I.

Witness continues: Page 179 of book 55 of deeds is deed
95 from Henry W. Stainton, mayor, to Conrad Wintsch covering lots 4 and 8 of block 24, with other property. Said document is marked exhibit J; was objected to as not showing

that the other was not amended, otherwise the document was admitted and it is as follows, to-wit:

Henry W. Stainton, Mayor,
to
Conrad Wintsch.

Know all men by these presents:

That, whereas on the tenth day of April, A. D., one thousand eight hundred and seventy-five, a patent was duly issued by the United States to me, Henry W. Stainton, mayor of the city of Lewiston, Nez Perces county, Idaho Territory, in trust for the several use and benefit of the inhabitants of the said city, according to their respective interests, by virtue of the act of Congress of March 3rd, 1867, entitled "An Act for the Relief of the Inhabitants of Cities and Towns Upon the Public Lands."

And whereas, an act of the legislative assembly of the territory of Idaho, approved January 8th, A. D., 1873, entitled "An Act to Provide for the Survey, Platting and Disposal of the Land in the City of Lewiston, Nez Perces County, Idaho Territory, Pur-
96 suant to the United States Statutes Made and Provided," directs and authorizes me the said mayor of the said city of Lewiston, under the provisions and limitations of the said act; to make and deliver to the *bona fide* occupants of such portions of the said land described in said patent, who may be entitled thereto good and sufficient deeds of conveyance in fee simple according to their respective interests.

In consideration of twelve and 4-100 Dollars to me in hand paid and received and by virtue of the authority above cited, I the said Henry W. Stainton, as mayor of the said city of Lewiston have this day granted, bargained, sold, aliened, remised, released, conveyed, and confirmed and by these presents do grant, bargain sell, alien, remise, convey and confirm unto Conrad Wintsch of the city of Lewiston, I. T., his heirs and assigns forever all of lot No. (6) six of block No. 15 and lot No. (4) four of block No. (24) and lot No. (8) eight of block No. (24) according to the plats of the said city, and lot No. (4) four of block No. (21) twenty-one;

The area in feet of lot (6) in block No. 15 2000 ft.
The area in feet of lot (4) in block No. 24 1162 ft.
The area in feet of lot (8) in block No. 24 1370 ft.
The area in feet of lot (8) in block No. 21 1485 ft.

97 Together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining.

To have and to hold unto him the said Conrad Wintsch of the city of Lewiston, Idaho Territory, his heirs and assigns forever.

In witness whereof, I, the said Henry W. Stainton, mayor as

aforesaid on this Twentieth day of September, A. D., one thousand eight hundred and seventy-five, hereunto set my hand and seal.

[City of Lewiston, Incorporated Dec. 27, 1866,
Idaho Territory.]

HENRY W. STAINTON, [SEAL.]
Mayor of the City of Lewiston, Nez Perces County, Idaho Territory.

Sealed and delivered in the presence of
JAMES GAGE.
W. G. LANGFORD.

TERRITORY OF IDAHO, *County of Nez Perces, ss:*

On this twenty-seventh (27) day of September A. D., 1875, personally appeared before me, a justice of the peace in and for said county and territory, Henry W. Stainton, personally known to me to be the person who executed the foregoing conveyance and acknowledged that he in his official capacity as mayor of the
98 city of Lewiston, I. T., executed the said conveyance freely and voluntarily, and for the uses and purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my seal this the day and year in this certificate above written.

D. J. WARNER, *J. P.* [L. S.]

Recorded April 7th, 1890, at 9 o'clock A. M. at the request of F. W. Kettenbach.

R. P. MUDGE,
County Recorder.

STATE OF IDAHO, *County of Nez Perces, ss:*

I, J. R. Lydon, county recorder of the Nez Perces county, Idaho, do hereby certify the above and foregoing to be a full, true and correct copy of the mayor's deed from Henry W. Stainton, mayor, to Conrad Winsch as the same appears of record at pages 179 and 180 of volume 55 records of deeds of said Nez Perces county, Idaho, in my office and under my custody and control and of the whole thereof and of all endorsements thereon.

In witness whereof I have hereunto set my hand and official seal on this Dec. 23rd, 1905.

J. R. LYDON,
County Recorder,
By GEO. E. ERB, *Deputy.*

99 [SEAL.]

Endorsed: Plaintiff's Exhibit J.

Witness continues: At page 565 of book T of deeds is recorded a deed from Henry W. Stainton, mayor trustee, to George Glass. This instrument is as follows:

H. W. Stainton, Mayor, Trustee,
to
George Glass.

Deed dated —— Filed for Record at Request of George Glass, April 8th, A. D., 1878, at 1 o'clock p. m.

Know all men by these presents that:

Whereas on the 10th day of April, A. D., one thousand eight hundred and seventy-five, a patent was duly issued by the United States to me, Henry W. Stainton, mayor of the city of Lewiston, Nez Perces county, Idaho Territory, in trust for the several use and benefit of the inhabitants of the said city, according to their respective interests, by virtue of the Act of Congress of March 3rd, 1867, entitled, "An Act for the relief of the Inhabitants of Cities and Towns upon the Public Lands."

And whereas an act of the legislative assembly of the territory of Idaho, approved January 8th, A. D., 1873, enittled "An
100 Act to Provide for the Survey, Platting and Disposal of the Land in the City of Lewiston, Nez Perces county, Idaho Territory, pursuant to the United States statutes made and provided," directs and authorizes me the said mayor of the said city of Lewiston, under the provisions and limitations of said act to make and deliver to the *bona fide* occupants of such portions of the said land described in said patent who may be entitled thereto, good and sufficient deeds of conveyance, in fee simple according to their respective interests.

In considerations of two dollars and 13-100 dollars to me in hand paid and received and by virtue of the authority above cited, I the said Henry W. Stainton, as mayor of the said city of Lewiston, have this day granted, bargained, sold, aliened, remised, released, conveyed and confirmed and by these presents do grant, bargain, sell, alien, remise, release, convey and confirm unto George Glass, of the City of Lewiston, Idaho Territory, his heirs and assigns forever, Lot No. (5) block No. (24) according to plats of the said city.

Said lot (5) in block No. (24) comprises in area 1062 feet.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise
101 appertaining.

To have and to hold unto the said George Glass of the city of Lewiston, Idaho Territory, his heirs and assigns forever.

In witness whereof, I, the said Henry W. Stainton, mayor as aforesaid, on the eleventh day of December, A. D., one thousand eight hundred and seventy-five, hereunto set my hand and seal.

[SEAL.] HENRY W. STAINTON,
Mayor of the City of Lewiston, Nez Perces County, Idaho Territory.

[Incorporated seal of City.]

Signed, sealed and delivered in the presence of
LOTT WIGGIN.
J. OLIVER.

I hereby certify the foregoing to be a true copy of the original now on file in my office for record.

—— ——, *County Recorder.*

TERRITORY OF IDAHO, *County of Nez Perces, ss:*

On this 8th day of April A. D., 1878, personally appeared before me, probate judge in and for said county and territory, Henry W. Stainton, personally known to me to be the person who executed the foregoing conveyance and acknowledged that he, in his
102 official capacity as mayor of the city of Lewiston, I. T., executed the said conveyance freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal this the day and year in this certificate above written.

[Probate Court Seal.]

D. J. WARNER,
Probate Judge.

I hereby certify *that* the foregoing instrument to be a true copy of the original now on file in my office for record.

THOS. HUDSON,
County Recorder.

STATE OF IDAHO, *County of Nez Perces, ss:*

I, J. R. Lydon, county recorder of the County of Nez Perces, State of Idaho, do hereby certify the above and foregoing to be a full, true and correct copy of the deed from Henry W. Stainton, mayor, to George Glass, as the same now appears of record at pages 565, 566 and 567 of volume T of deeds of Nez Perces county, Idaho, and of the whole thereof and of all endorsements thereon.

In witness whereof, I have hereunto set my hand and official seal on this 23rd day of December, 1905.

103 J. R. LYDON,
County Recorder,

[SEAL.] By GEO. E. ERB, *Deputy.*

Endorsed: Plaintiff's Exhibit K.

Thereupon the following proceedings were had:

Mr. TWEEDY: Can you admit Mr. Scully is the owner of lot 6 whatever the dimensions are?

Mr. SMITH: I admit he owns the building whatever its dimensions are, but we claim its dimensions are greater than he has built on and always have.

Thereupon on cross examination the witness gave the following dimensions and none other; the following proceedings were had and none other.

WITNESS: I have the numbers as they were called for of these lots—I have not the names—I have the books and volumes and the exhibit number, if you will tell me what book and page lot 1, block

24 is—at page 112, book T is a deed from Henry W. Stainton, mayor trustee, to Wesley Mulkey. It is dated Dec. 11, 1875, recorded same day at 2 o'clock P. M.

The recorded plat which was introduced was recorded at the request of Alonzo Gilman, mayor of the city of Lewiston, on the first day of July, 1879 at 9 o'clock A. M. Turning to page 112
104 of book T and reading the description that is given there it is, all of lots 1, 4 and 5, of block 16 and lot 1 of block 24, and lot 5 of block 30, according to the plat of said city, said lots numbered 1, 4, and 5, block 16 contains in area 15,200 feet; lot numbered 1, of block 24 contains an area of 1257 feet and lot 5 of block numbered 30 contains an area of 10,000 feet fronting on E street, and 18,823 feet in acres, making in the aggregate 45,285 feet.

Witness continues: At page 75 of book T of deeds is a deed from Henry W. Stainton, mayor of the city of Lewiston, to J. Q. Moxley conveying all of lot 3, block 24 with amendments, according to the plats of the said city, said lot comprising an area of 1136 feet.

Witness continues: At book 38 of deeds, page, 174 is a deed from Henry W. Stainton to T. J. Bucher and Hazen Squier.

SMITH: You admit they are the predecessors of Louisa Squire?

TWEEDY: Yes sir.

Witness continues: My attention has never been called to the records of Nez Perces county, showing any of the original applications that were made by parties for property fronting on D
105 street. I have been acquainted with lot 1, block 24, where Dr. Moxley's Drug Store is since March, 1889, and I was acquainted with the other lots and blocks in this controversy at the same time.

Thereupon the witness was excused.

MATTHEW SCULLY.

The plaintiff was called, sworn in his own behalf and on direct examination gave the following testimony and none other and the following proceedings were had and none other.

Examined by Mr. TWEEDY.

Name, Matthew Scully, residence, Lewiston, Idaho.

I own lot 6, block 24, and have a three-story brick building on it. The lot is north and south; that is extending from Main street to D street and is 57 feet.

SMITH: We will object to that; that is in accordance with True's survey and the field notes are not in evidence.

The COURT: The building—about what length the building is, you can give that.

WITNESS: The building is 57 feet on the east line and 63 on the west line. It is about 27 feet wide. I have doors and windows in the north end of that building. A general description of the
106 rooms and the arrangement on the north side with reference to D street is: There is a double door on the north end

of D street, that is on the north end of the building joining on D street, bordering on D street and two windows, that is on the lower story; there are in the second story two windows and in the third story two windows, there are four rooms on the second and third stories on D street; the lower floor is occupied by the post office and the two upper floors by a lodging house. East of me and projecting beyond my building is the building that Mr. Fix is putting up—it extends out—the stone work extends out four feet four inches beyond my building and the brick work four feet, as near as I can measure it out, past my building further north. Mr. Fix's building immediately joins mine—it extends at right angles north beyond my building. The buildings being erected by the other defendants go out beyond the north of my building some distance. They are on the line with the Fix building—that is what is constructed of them. I cannot see the sidewalks on D street from the east windows on the north *on the north* end of the building except about opposite to my building and that would be a little more than
107 27 feet wide—I do not just know how wide.

COURT: I think you can pretty well tell Mr. Tweedy by experience. I don't believe you will have to get the witness' opinion about it but you may go ahead.

WITNESS: The direction of D street from my building is—it runs at right angles east and west and the north end of my building is east and west on a direct line and so would their's be. I do not know as to what rent I would be able to procure with the building standing out as it is now built, but I am sure that I could not get as much rent as if the building stood even with mine I couldn't get as much rent because the light, the air and the view are all obstructed. I could always rent the building for something. At the present prices I am getting for it, it would be harder to rent the building for the same prices with that obstruction there as without. I don't know exactly the value of that building with the obstruction placed to the east of it, but the value of the building with the symmetry on D street being broken would not be as much as with it not broken. I believe there would be the difference that it would cost to construct a new end onto my building to extend it out even with the
108 Fix building, and I could not say what that cost would be. I do not think it could be done with one thousand dollars. I presume it would cost somewhere between fifteen hundred and two thousand dollars. I think there would be a material difference between the rental value of my building with the obstruction and without, as it now is.

I came to place my building where it is in this way; prior to constructing the building, which was in the month of April, 1900, I employed the city engineer, Edson Briggs, (he was city engineer at that time) to survey my lot for me, so as to enable me to know where to build the building, and he did so, and I built the building accordingly, and I completed the building on the lines which he gave me, as the lines of D street. Mr. Briggs was city surveyor at the time. He is now called city engineer—they called him then the city surveyor.

At the time I had the conversation with Mr. Fix about the lines of D street, and that conversation was, Mr. Fix wanted me to go in with him and Dr. Moxley and Mr. Squier and have us all go into the city council room and ask permission to build out on a line with our old buildings where they stand, to somewheres along
109 there, to straighten the block up, as he called it. I was constructing the foundation at the time, started in to construct the foundation—and I told them it would be useless to do so, that I couldn't see any argument to bring to bear on the council for them to grant us any such privilege. Mr. Fix told me that he thought there was an argument, that by us getting more ground our building would be larger and the city would receive larger revenue from taxes and would be consequently benefitted, but I told him that I thought they would regard it very differently, but I could not see for my part any argument in it, and I declined to go in and make any attempt for to procure any portion of the street to straighten it up.

Witness continues: There wasn't any question or any dispute as to the lines that Engineer Briggs established there. Mr. Fix was present when he surveyed it. Mr. Moxley was present when he surveyed it. Mr. Moxley was present and Mr. Bob Grostein was present. All of them had property there and none of them objected or seemed to dispute the lines at all, only Mr. Fix thought as Mr. Moxley's brick building stood out further north, it would be better for them all to extend out, and he thought that D street would be wide enough any way, that it would be no detriment to the
110 city.

In relation as to what he said as to that portion of his building which extends beyond the north end of my building, being over the line of the True survey—I don't just remember what he stated. He admitted of course that all our buildings extended over the True survey and he thought it would be a benefit to us and not a detriment to the city, to vacate a portion of the south line of D street to straighten it up, so as to come out to where he is running it now.

COURT: Is that your knowledge or your conclusion? Is that the language he used?

WITNESS: Well, I don't know the exact language, but that was the substance of it.

Thereupon, on cross examination the said witness gave the following testimony and none other, and the following proceedings were had, and none other.

I say that Mr. Fix wanted me to join with him to ask the council to go out to the line that I had been occupying with the old wooden building.

When I bought that land there was an old wooden building that came out not quite, pretty near though, but close to as far as
111 Fix's building does now, and immediately west of me is Grostein with a big wooden building there now and that building was there when I bought the land, and my building came

out a little further, I think, than Grostein's building does now, Mr. Grostein's building, as it now stands, has been there seventeen or eighteen years, and it extends out beyond my building about the same distance as Mr. Fix's building, but not as far. The west end of Grostein's building doesn't extend over three feet—the northeast corner extends out further than the northwest corner, but I do not think it extends out three feet, probably two I think.

Q. And when you built your building you voluntarily set it in to what you thought was the line of the True survey—is that it?

A. No, not voluntarily. I went in according to the survey of the engineer.

Q. According to the line of True's survey as he gave it to you?

A. Yes sir.

Q. And that left Fix's old building extending out beyond you and the Grostein building out beyond you?

A. Yes sir.

Q. At the time you built your new building, Mr. Fix's land,
112 the land that he claims now, and the land on which he is building was actually covered by a building.

A. Not as far as his brick is going, quite.

Q. How much does it lack?

A. Five or six inches I think.

Q. It is the distance of the stone wall, isn't it?

A. No, the brick is further than the old building was.

Witness continues: I never measured the distance of the brick, but the brick I think comes out six or eight inches further than the wooden building did. This stone work of Mr. Fix's that I say is out about four feet six inches—that is down under the surface of the street, the foundation and he has excavated under his side walk just like other people who build.

Coming down to the Moxley lot the lot No. 3, west of the Squier lot, I could not say as to whether he is going out further than his old building extended. Of course I never took any measurements of that and I couldn't say. The fact is that these old wooden buildings were destroyed by fire recently, but as far as my knowledge goes, without giving an accurate measurement, I think the new buildings are just a little further than the old ones, probably
113 six or eight inches.

COURT: Do I understand the Grostein building has been destroyed.

A. No. It was never as far north as the other buildings.

COURT: Is still standing there?

A. Yes sir.

Witness continues: I do not think the Moxley building covered practically all the ground that Moxley is claiming for his new building. My impression was that the Squier building on the Squier lot was in a little further *as* where he started the foundation for the new building, but I couldn't say just how far because I did not measure. I have been acquainted with the City of Lewiston twenty-seven years about.

Q. You are acquainted with the brick building on lot 1, block 24, where Moxley has his drug store?

A. Yes sir.

Q. Ever since you have known the City of Lewiston that building has been there, hasn't it?

Mr. TWEEDY: I would like to object; it doesn't seem to me it makes any difference if it had been there.

Mr. SMITH: I want to show the south line of D street
114 by actual use and occupancy.

The COURT: I think I will get the facts as to how long the buildings have actually been on it, but don't think it is proper to go into it by this witness how these lots—I think it is proper to come before me anyhow, and I will let him answer the question, giving the plaintiff an exception. How long has it been there?

A. I don't think it has been there that long. I think when I first came to Lewiston, that was not built there, but I wouldn't be sure. I came to Lewiston seldom then, I lived out in the country.

Q. You don't know of your own knowledge, Mr. Scully, that any part of the lots covered by these old frame buildings of Mr. Fix and Mr. Moxley and Mr. Squier and Mr. Grostein was ever used as a street, was it?

Objected to as incompetent, irrelevant and immaterial. Objection overruled. Plaintiff excepts to the ruling of the Court.

A. No. I don't think it was ever used as a street; I think the buildings covered a part of the street, though.

Q. You do not know of your own knowledge, Mr. Scully, that any part of the land covered by these old frame buildings of
115 Mr. Fix's and Mr. Moxley's and Mr. Squier's and Mr. Grostein's was ever used as a street, was it?

Objected to as incompetent, irrelevant and immaterial. Objection overruled, plaintiff excepts to the overruling of the Court.

A. No, I do not think it was ever used as a street. I think the building covered part of the street though.

Q. You are basing that conclusion upon the line that was given you as the line of True's survey?

A. Yes sir.

Witness continues: I could not say as to whether those buildings were standing at the time of True's survey or not. I was not acquainted with the occupancy of those lots at the time of True's survey. I was not in the city then. I did not come in for two or three years after that.

In relation to the distances of the blocks from D and E street-, I was not a member of the city council at the time I had this talk with Fix, that was two years before I was a member of the city council—that was in 1900. In relation to the distance between D and E streets, I am acquainted with block 23 over where the Castle saloon is—Charlie Parker's saloon
116 but I do not know what distance it is there. I think the plat shows it to be the same as what our block is—block 24—that

is the eastern portion of our block. I think I owned that land about two years before I tore down or removed the frame building, and during that period I owned a frame building that ran out nearly as far as the other does, and I couldn't say how long that building has been there, but a long time, by the looks of it. I had no information about it. It was there when I first came to Lewiston in 1877, and I do not know how much longer, and it was not a new building then.

Q. Now then, there was no part of the premises, no part of the lot, that that building actually covered, used as a street to your knowledge until you pulled in your new building four feet, was there?

A. Oh, I couldn't say as to whether it was before I came to the city first or not, but not since I came to the city—not in the last twenty-seven years there was no part of it used as a street.

Q. I was asking you, after the building was constructed it couldn't be used as a street with a building on it, could it?

A. No, that is why I say it was not.

117 Witness continues: When I built there my old building did not come out as far on E street as my new one—not quite so far.

Q. How many inches did you take in there?

Mr. TWEEDY: We object to that—that is immaterial.

COURT: I don't see what that has got to do with it.

SMITH: I want to show, when he came to E street, he is doing what he claims the defendants are doing. He is not coming in with clean hands.

COURT: I will sustain the objection.

Witness continues: Since the proposed building of Fix, Moxley and Squier having been started, the occupancy of my building has been the same as it was before, the same parties occupy it. The lower floor is leased to the government and I have a ten year lease on it, so get the same rent now as before, and the two upper stories I am getting the same rent for and will until the lease is out. The lease runs until next March. The ten year lease began with the government three years ago this month, I think.

Witness excused.

Thereupon D. C. WRIGHTER was called as a witness on behalf of the plaintiff and gave the following testimony and none
118 other, and the following proceedings were had, and none other.

Name, D. C. Wrighter, and city engineer of Lewiston.

I have searched my office for the original field notes of the True survey. I have made diligent search and have been unable to find them. I have made a thorough search in everything about the city hall. I believe I would be the custodian of the field notes and they are supposed to be the records of my office. I have made a search of this block 24. I did not find any original monuments there. There were no original monuments in connection with the block, that is in taking the notes from what is purported to be a recorded

copy of True's notes, the block is tied to the northwest corner of block 23 and we go from that. There are some pipe monuments in the intersection 2d and D street- but who put them there I don't know. They are made of gas or water pipe and were driven at the intersection of the streets and in making this survey I checked the gas pipes around block 24 and used them as the intersection of the streets, assuming, you understand, that they were correct. (A document is handed witness.) This document is a copy that I got
119 from the copy of the notes in the county recorder's office. I made a copy of this book here—the field notes.

Q. Now you may state when you made this survey of block 24, if you followed those field notes of which you have a copy.

A. I don't think you could follow those and find those monuments by commencing at the northeast corner of block 23.

COURT: You did follow them?

A. In a way, yes, you had to—back it in; you can't commence at the beginning of these notes and follow them out—always vital discrepancies some place in these notes.

Witness excused.

Thereupon EDSON BRIGGS was called as a witness on behalf of the plaintiff, sworn and gave the following testimony and none other, and the following proceedings were had and none other.

WITNESS: Name, Edson Briggs; have lived in Lewiston since 1880. Have lived in the northwest 36 years; am a surveyor and civil engineer, have been city engineer two terms, and am now county surveyor of Nez Perces county, Idaho. I have had occasion to survey property in the city of Lewiston; am familiar with the True tract and field notes; there are other plats and field
120 notes of the city of Lewiston, but they are made after the True plat; not covering the ground that his notes do—none; (map shown witness) I have seen this map before, is the E. B. True map of the city of Lewiston, that is what it says on the map.

SMITH: You don't know of your own knowledge?

WITNESS: I never seen him make it.

TWEEDY: I think you admit that this is the true map, don't you Mr. Smith? I understood you did.

SMITH: I think that is the True map from the Memoranda put on it.

WITNESS: After examining that map, I say I have seen those red lines on it. I first saw that map, I think after I had been city engineer—city surveyor, for one term before I saw that map. I think that map has been resurrected in after years, but I saw a duplicate on a smaller scale we had to work by and the field notes but this map I never saw until I had been city surveyor two years; I won't swear positive as to whether the red lines were on it or not; I wouldn't swear to that . The red line shown running over my property was not there when I first saw the map; those were
121 put there since I saw the plat, those red lines were put there —since—but I would not swear to these (indicating); that red line shows the way the street actually runs now—they travel it that way.

Q. The field notes never showed that?

A. The reason why I know positive, I was trying to locate this boulevard in connection with this property and we started just exactly one street too far south, and hadn't checked on this point, and I know those lines were't there. The red lines you now point out—I don't remember seeing them there, I wouldn't swear to that because I was not interested; but I know positive those lines were not there. (Indicating.) I didn't really have possession of those field notes. I have seen them, however. I made copies of those field notes, at the time we were locating this monument over there in Judge Poe's yard, and Rainey had the field notes, and I wanted them to make a copy and he said he could't let me have them because he had borrowed them from the city clerk, so I went and made a copy also of the lower part of town.

122 I have copies from block 1 to block 24: this is the book right there, in my own handwrite—the copy; the field notes of block 24 are correct from the original True's notes.

(After colloquy between counsel, witness was asked to hunt for original notes.)

Q. How long would it take you?

A. I don't know, two or three tons of election returns, the last six or seven or eight years—books in there of every description. I think I could find it by tomorrow morning. I can't go *go* through all that stuff this afternoon.

COURT: They might be introduced afterwards, or do you want it done so you can cross-examine.

(Thereupon counsel for the plaintiff announced that he would see if he could introduce the evidence other than the field notes, and the following proceedings were had:)

WITNESS: I made a survey of block 24 according to the copy of the field notes that I now have.

(After colloquy, witness agrees to hunt for original notes.)

Thereupon the witness was cross-examined, and gave the following testimony and none other, and the following proceedings were had and none other.

123 WITNESS: The first I ever saw that plat was, I think—let me see—it was while Maxon was doing work for me; he found it somewhere, I don't know where. He brought it into the council room. I don't know how long ago that was—It couldn't have been but five or six years ago, if it *was* been that long; I don't known that Jay Woodworth dug this map up from the old files and records of the city, or that that is the way the city came to have it; I think Maxon was the first one I ever saw have it. He gave it to the city engineer, I think, and wanted to know if he didn't think it was a good thin*k* to have it framed. I was city surveyor and he was working for me. That was the first time I ever saw that map, and I looked on that and didn't see those marks at that time. I don't recollect having seen them before this time. Stepping down to the map and looking at what purports to be Sixth street—the map

showing a full sized street there and ask you if you recognize the alley shown there as the alley down by Mrs. Richie's Millinery store—I do recognize it as such; and whether those lines running from E street up to north central part of C street east of the boundary shown for Sixth street, was on there at that time,—I never used this map for any of the survey at all. I don't know anything
124 about the red lines—only, when he first showed me the plat, because I was contending that the city claimed to have a street and the old records of the True notes don't show anything about the street; don't mention that street in the field notes at all. I don't think it does, this entire street here in deeds or records in the recorder's office. I don't know how those red lines came to be on what is known as Sixth street. I did not notice all the red lines north of block- 22, 23, 24, 25, that on there, no sir, not all of them. I didn't examine it carefully, because I looked at the street running through my property. I went to the records to see if there was a street running through there. I don't know who put those red lines there; I never saw that red line through my property.

Witness continues: The book you hand me is the original notes of the city of Lewiston, by E. B. True's survey.

Answering questions by Mr. Tweedy:

WITNESS: This book you hand me is the same book I saw first in the custody of Mr. Poe, city clerk; it is the same book I saw there.

Thereupon the following portions of the said notes were offered and received in evidence:

First, the field notes of the survey of D street.

125

Course.	Dist. in fe't.	Width.	D St.
S. 86 15″ E.....	280	80	Begin at intersection of D and 1st running
	560	80	Begin at intersection of D and 2nd running
	480	80	Begin at intersection of D and 3rd running
			Begin at intersection of D and 4th running
	1122	80	Begin at intersection of D and 5th running

Second, the field notes of block 24:

Begin at N. W. corner block.

N. 86¼ W—80 dist ft, set stake at N. E. cor. block 24.

N. 86¼ W—200 dist ft S. side D, name, set stake at N. W. cor. block 24.

S. 3½ W—75 dist ft E side 2nd name, set stake at S. W. corner block 24.

N. 76¾ E.—19½ dist ft N. side E name, set stake at bend No. 10 E. st.

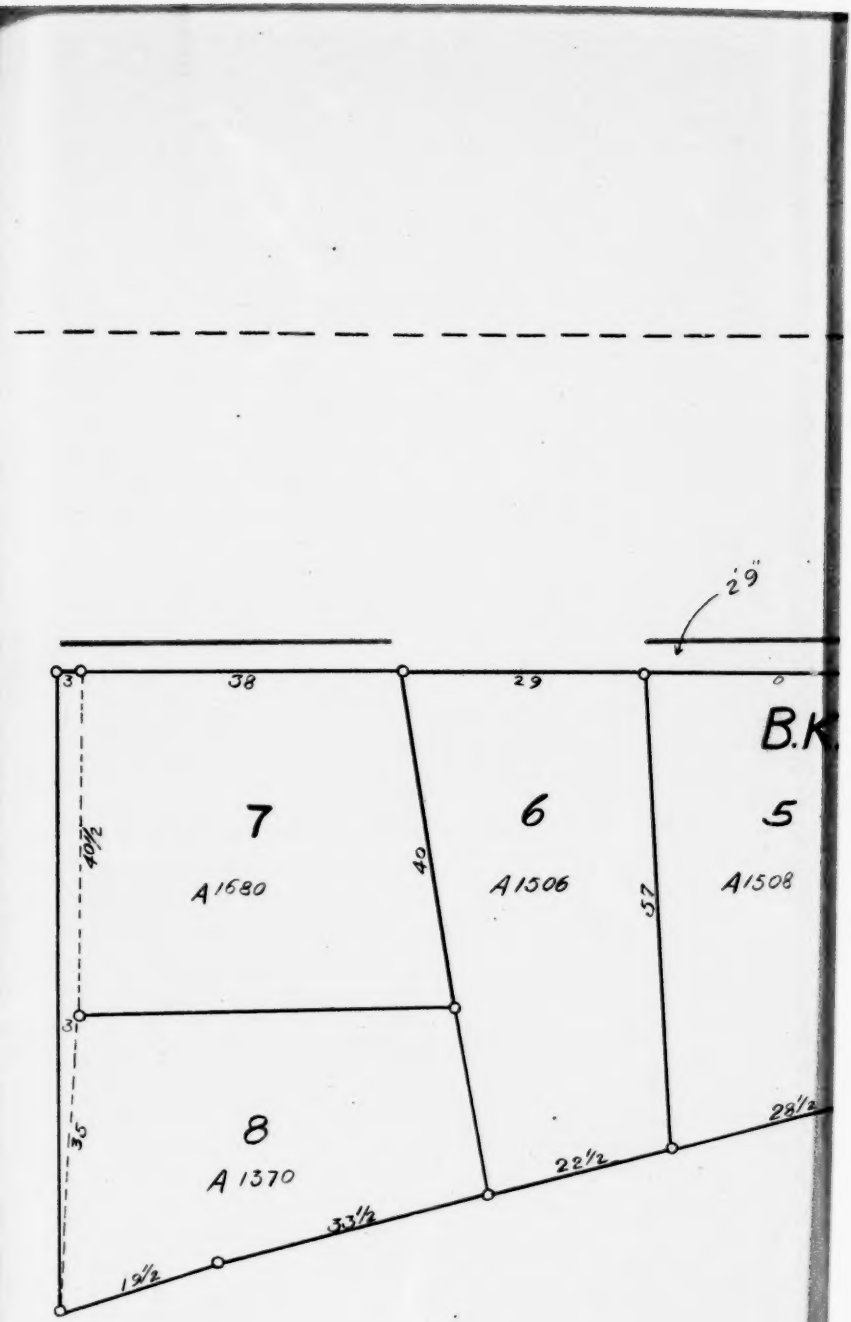
126 N. 80 E.—84½ dist ft N. side E name, set stake at bend No. 9 between lots 4 and 5.

E. 50—N 2 side E name, set stake at bend No. 8 between lots 2 and 3.

S. 86½ 50, N 2 side C name set stake at S. E. corner block.
N 3½ 45 dist ft W side D name 3 to set stake N. E. cor. block.

Third, the field notes of the lots in block 24.

Lot.	Side.	Length.
	1—3rd	45½
	E.	25
	1 and 2	45½
	D.	25
	Area 1137; equiv. 50 x 100, .227.	
	2—E.	25
	2 and 1	45½
	2 and 3	45½
	D.	25
	Area 1131; equiv. 50 x 100, .226.	
	3—E.	25
	3 and 2	45
	3 and 4	46
	D.	25
	Area 1136; equiv. 50 x 100, .227.	
	4—E.	25
127	4 and 3	46
	4 and 5	47
	D.	25
	Area 1162; equiv. 50 x 100, .232.	
	5—E.	28½
	5 and 4	47
	5 and 6	57
	D.	30
	Area 1508; equiv. 50 x 100, .301.	
	6—E.	22½
	6 and 5	57
	6, 7 and 8	63
	D.	29
	Area 1506; equiv. 50 x 100, .301.	
	7—D.	38
	7 and 6	40
	7 and 8	45
	2nd	40½
	Area 1680; equiv. 50 x 100, .336.	
	8—To Ioty bend—E.	19½
	To line 8 and 6	33½
	8 and 6	23
	8 and 7	45
	2nd	35
	Area 1370; equiv. 50 x 100, .274.	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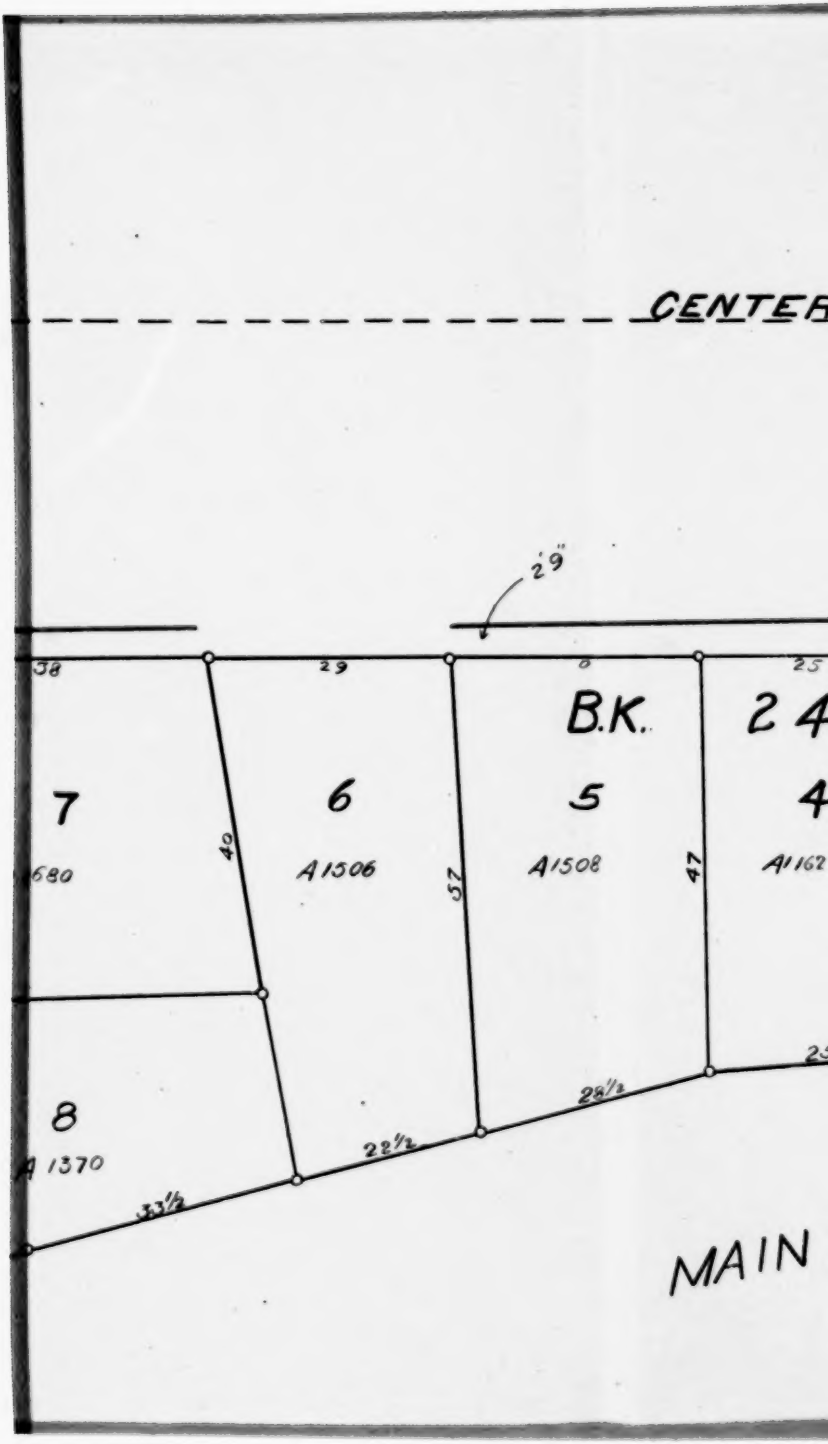
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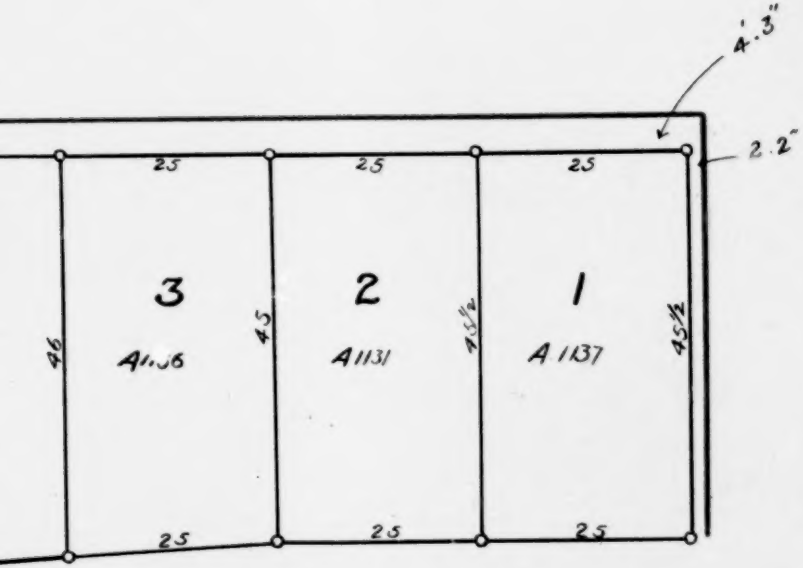
NO. 492.
Scully
v.
Squier et al.
} p. 128 a

D St.



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Witness continues: I was city engineer of Lewiston in
128 '91 and '92 and prior to that; and that was the time when Mr. Scully asked me to do some surveying as to block 24. I surveyed block 24 at that time; I have that record of that survey by me, and here it is from the notes; these are the notes I made at that time; I didn't make this map at that time—but this is a copy of the map then made. It is a true copy as I gave Mr. Scully the original. The red lines on this map show where the buildings stand—where they extend over what I call the south line of D street—where the buildings stand, which map is introduced in evidence and here attached and made a part of this statement, to-wit, as follows:

(Here follows map marked p. 128*a*.)

WITNESS: The black line you point to represents on that map, the south line of D street and that is what I call the property line; the red line represents where the buildings extend out into the street; I located the north end of Scully's building on that line—the north end of his building on lot 6; his building runs out only to the black line; and Mr. Fix's building that he is building now, runs out to the red line; that building runs out beyond the black line, well, it is a straight line, and it runs out I think three feet and nine tenths, there at that part, at the N. E. corner of the block,
129 extends four feet and .3; I used my own field notes in making this survey—they were a correct copy of True's field notes, I copied them from the original. With reference to the property or the street line, at the Scully building, it is right where the north end of the building now is, the present Scully building; it has been erected since the survey; it is right on that line, on the property line; the way I found the line where the buildings were, I found that line—run an off-set line—and run back to his building, which gave the property line, but I might determine that measuring from the center of *the* D street; from the center of D street to the north end of Mr. Scully's present building, it is 40 feet; D street is 80 feet wide; I did not take D street as correct and measure from the middle of it; I run from monument 10 and turn to 5th and D street-, and then I run a line west and intersected the north and south line, between the two monuments on C street and checked from there and determined the true line of D street. In doing this, I used my copy of True's notes, I did not have the original with me. It was a true copy I made of them and there is fixed monuments on C street, and they have checked in from that line that runs up and down
130 the street, and determine the center of D street.

Thereupon, on cross examination, the witness gave the following testimony and none other and the following proceedings were had and none other:

WITNESS: I made this survey for Mr. Scully before his building was torn down; I can't give the exact date; his old building did not go quite as far north as Mr. Fix's, I know the wooden building extended over the property line. Looking at this plat, and at lot 6—Scully's lot, the reason I left off the red line there, I wanted to show where the building is at the present time. I didn't continue that red line on through because this plat was not made until after the brick building was built. This is a copy of the plat I gave him, by the notes. This is before the brick building is completed; but I said this red line is to show the property line and the property as it extended over the street line. These buildings were actually in existence as I have drawn the red line.

Q. How long have you been in Lewiston?

A. Off and on since '73.

Q. Do you know lot No. 2 of block 24 belonging to Mr. Squier?

131 A. Yes sir.

Q. Do you know the old building that was recently destroyed by fire, there?

A. I did, yes sir.
Q. How long had that building been there?
A. It was there when I came to the country.

Mr. TWEEDY: I object to all this cross examination for the reason that it is not proper cross examination, and for the further reason that that red line is to show the obstruction as the defendants propose to make it at the present time, and for the further reason that occupancy does not give them any title to that part of D street as shown by the True survey.

The COURT: This all has to come before the Court, and I don't believe I will lose anything to let it come in at this time. You have already asked him where they stood, what lots, and just for the purpose of showing the obstruction, but I think I will let them ask the question.

Mr. TWEEDY: I didn't want to be placed in the position of admitting this without objection.

The COURT: I think it is just as well for me to hear the evidence now. I shall overrule the objection.

Exception.

132 WITNESS: I don't know how much longer it was there; I don't wish to be understood as testifying that space represented between the black line and the red line was ever used as a street. No sir. I came here one year before True made his survey, the first time I came here was in '73; the red lines show the building where Moxley's Drug store is on lot one, block 24, as is actually in existence; I don t know exactly how long that building has been there, but there was a building there when I first came here and I think it covered the lot. I am acquainted with the building on what is commonly known as lots 7 and 8, block 24, known as the Grostein building; the red line here, shows how far that building comes out beyond the black; it shows, but does not come out quite that far; it gradually tapers; I think it is about a foot—it grows wider—down there probably a foot, I don't remember exactly, I mean the original building. The building that is there now was there when I made this survey. In relation to the distance that building comes out beyond the Scully building—the building of Fix comes out 3.9, while at the corner of the original Grostein & Binnard building, is less; I wouldn't want to swear positive without notes; one foot and
133 seven-tenths, or 2.7, Mr. Wrighter can state positively. According to this—the line which you call for convenience the building line—where the buildings were,—was a fairly straight line; when I surveyed this property I noticed where the front of Scully's old building was.

Objected to and sustained. Excepted to by defendants. Defendants offered to prove that in the construction of the new building Mr. Scully had taken 16 to 18 inches of what was E street.

WITNESS: The old building of Mr. Scully was on his lot at the time I made this survey, and was out almost to the red lines I call the line of D street; that building had been there—before I came to this country; it was quite an old building then; I didn't take much

notice of it; but I know the building was there. I remember the condition as to the Moxley lot—No. 3, block 24—there was a building on there.

Q. And as to lots 4 and 5, we will speak of lot No. 4, what was that, the John Glass lot?

A. That is the Squire lot.

Q. Four?

A. Yes, that is where Glass was.

Q. And lot 5 was James Kearney's and Conrad Wintsch's?

134 A. Yes sir.

Q. Those buildings were there too?

A. Yes sir.

Q. The buildings recently destroyed by fire, being 2, 3 and 4, and lot 5 of block 24, were covering these lots as they stood just prior to the fire for a period in your recollection that dates back prior to the True survey?

A. Yes sir; about that time.

WITNESS: I have checked block 24, with the field notes, and the plat of Mr. True,—and it is not absolutely correct. I make a small error in the plat and survey, on its face; the distance and the monuments will check almost exactly, but the courses will not exactly fit, in going around and closing. I have figured that with the present city engineer. He makes the error more than I do: I make an error of only about a foot; he makes it nine or ten feet, that is the way he says. I have had occasion to run the E. B. True line on east of block 24.

Q. Did you ever have occasion to run the E. B. True line on D street on east of block 24?

A. Yes sir.

Q. Isn't it a fact the line of D street according to E. B. True's survey goes through all the building- in block 23, beginning

135 where Eben Mounce is, and running through the new Vollmer building, Ranson Coburn's place, and through the Binnard and Thiessen blocks also?

Objected to as immaterial.

The COURT: I don't care to know whether it is going to take other property or not. I don't think I will go into it. It is not proper cross-examination, anyway.

Witness continues: I am sufficiently acquainted with the handwriting of E. B. True to know this is his survey, and that these are his field notes; I was not acquainted with the town of Lewiston, before his survey; I never saw a plat of the town before True made his survey; let me correct that—I did see such a plat since this trial started; I never saw the original; Mr. Wrighter had a copy in his possession; I saw a little sketch purporting to be a plat made of this town before True's survey; going back to block 24—taking the field notes of E. B. True, I say I know from the survey I have made how long north and south the buildings on lots 1, 2, 3, are before you strike the bend in E street in front of Fix's property—two bends in

E street—the notes will show the numbers of the bends—and
136 looking at the notes of block 24, and also recalling to my mind my own plat, that building of Dr. Moxley's is about 50 feet north and south. This end of Grostein's frame buildings at this point next to Scully's lot was cut further than Scully's original building; how far, I don't know; there was a little jog there; I don't remember how far and Scully's building was the shortest building that was in the line; and I don't think it was out as far as the northwest corner of that building on block 24; following the property line—the building line—would make D street wider at the west end than otherwise.

Witness excused.

Thereupon D. C. WRIGHTER was called as witness on behalf of the plaintiff, sworn and gave the testimony as follows and none other and the following proceedings were had and none other:

WITNESS: I- making survey of block 24, I got the record from copy of the notes that I made, copies in the recorder's office; I have not compared these notes with the originals here, as I saw them for the first time this morning; I have often searched for the originals; I can compare them in a moment, if it would be proper. (Witness compares block 24.) With the exception there, which would
137 be very hard to determine, it is the same. I have examined them enough to know they are the same, with that exception, and I am unable to determine from the original what that is; it is hard to say; I suppose that 86 would hit it nearer than anything else. It is 86 in this record copy and one might call it 80 or 89, something like that; it is a little difficult to tell exactly; the copies same as made from the original; am city engineer; defendants asked me to survey a line with reference to D street; they asked the city council, and I was ordered by the city to make a survey of the block (24). I gave them a line 24 feet from the center of D street for the curb line; Mr. Scully never asked me for the curb line on D street north of his lot; the north end of his building from the center of D street is 40 feet; in relation to the line I gave the defendants, the line was in controversy and I couldn't make the block notes close, and I left it in rather an unsatisfactory way, and I told them I would give them the curb line, that is the way the matter came up; I told them I would run the line as near as I could make it from the notes; they wanted a
138 building line and I told them of course I couldn't establish a building line on those lots; I told them I would give them the line of Scully's building as the line on which to build; they didn't press for it and I didn't give it; I can't tell the conversation; I gave them nothing but the curb line; the document you show me is a map of block 24; made from the field notes in the possession of the city—the copy; notes of E. B. True; the black line on the north represents the property line, according to True's notes; and the inner red line represents where the old buildings were, as this survey was made to represent where the old buildings were; this survey was made before the fire, last August, or some time in the summer; this

plat was made, I think, in June; this line represents the building line, and this the curb line, and the outer line of red is the curb line. The old buildings were not cut equally to a hair, but they were generally; I know about that by measurements; I came to this city the first time in 1890. I have not resided here continuously, though; I have no recollection of the block at that time and hence cannot say whether or not Scully's old building was there at that time. To the best of my recollection, this plat was made according to the survey,
and that was, as they say, in June of the present year. I
139 made it. Made my measurements to that red line, yes sir; I
haven't any recollection of the old Scully building, and, hence, don't know about the Grostein building coming out even with the Scully building. When I drew that red line, I didn't suppose anything about the buildings coming out there, even; as I say, here is the line here, and here is my outer center line of D street. There is a pipe here and there.

This is at the intersection of third street and D and this is a pipe at the intersection of Second and D streets, 280 feet between these pipes. Now at this corner here are the figures from where the line of True's survey would come and where the building is, and the same way to this corner. The way I got that red line was, I drew a straight line from one to the other, because the buildings were there; here is a notation. Here is the post-office, and here is the brick line, this patch along in here. I represent the old buildings as being in a straight line, because I know of my own knowledge they were; they were practically even, I wouldn't say an exact line. I did not see the Scully building before he tore it down and erected his new one. I don't know anything about how for it came out.

The other buildings, before they were burned down, I know
140 of, because I had to run an off-set; I couldn't run the line
as laid out in the notes; I couldn't follow those notes, because the buildings were in the road and consequently had to run an off-set line, and then determine how far it came out to each side. Perhaps this red line is confusing, as I have stopped this red line at the postoffice because it means nothing there. I know of Fix erecting a new building there; he is bringing it out, I think, to the inner red line; the red line just north of the True survey. The northwest corner of lot 5 is distant from the red line I have, nearly four feet, about 3.9 feet. Fix is bringing his new building out to the red line we are speaking of, now. I am building inspector, now, in Lewiston; hold two offices; I saw Fix's new buil*d*ing, the last time, this morning; it is above the first floor I believe; above the window sills; it is pretty near to the third floor; they are cutting in the brick wall for the joists on the third floor; the other defendants were also building the other day; they are building out as far north as Mr. Fix. At the northeast corner of block 24, according to True's notes, as represented by the black line, it is 4.3
feet to the red line; at the northwest corner of block 24,
141 according to True's survey as represented by the black line,
it is 1.75 feet to the first or inner red line. It is sixteen feet to the curb line as shown by the map according to True's notes

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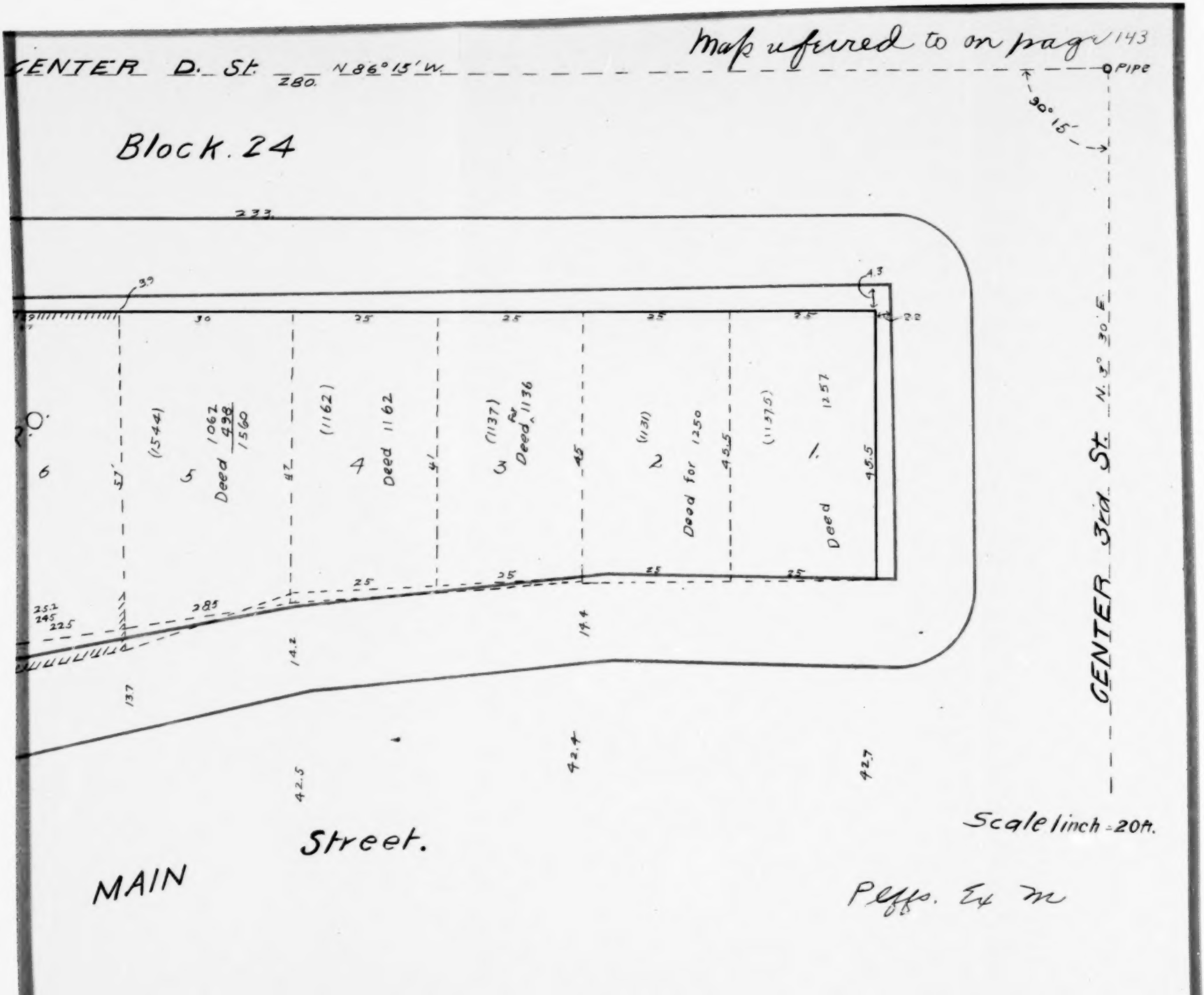
Map ufured to on page 143
CENTER D. St.
280.
N 86° 15' W.
PIPE
90° 15'
Block. 24
233.
39
30
25
25
25
25
4.3
(1544)
5
Deed 1062 498 1560
(1162)
4
Deed 1162
(1137)
3
Deed for 1136
(1131)
2
Deed for 1250
(1137.5)
1
Deed 1257
45.5
6
5'
42'
41'
45'
25
25
25
25
25
25
25
25
252
245
225
285
137
14.2
14.4
42.5
42.4
42.7
N. 3° 30' E.
CENTER 3rd. St.
Scale 1 inch = 20 ft.
MAIN
Street.
Pfffs. Ex m

or survey. It is very difficult to find the south line of D street according to True's notes and plat—it is very difficult to find what was intended there. The reason is that the notes will not close. Starting in here at the N. E. corner of block 24, following the notes, running around this block, turning these angles, running this distance and coming up here you will not close. The starting point to find the south line of D street is—I would not find the south line of D street by or from block 24; I would have to start from the monuments in the city. I can give you a more intelligent answer on the plat, referring to plat. We have a monument here at the intersection of A and First streets and we have a monument here in the south line of the center of First street, where it intersects the south line of E or Main street; now the field notes call for the survey of D street, beginning at the intersection of D and First streets, I think right here, running south 86 degrees and 15 minutes east, coming to the intersection of Second street; then 280 feet more or
560 feet from the place of starting and coming to the inter-
142 section of third street, that is block 24; now, that determines
the line of Third street. Your question was in regard to block 24. I was running it regardless of 24, now on that line. This pipe that I designate on this plat *are* in the center of D street. The notes say D street is 80 feet wide. Taking that center line, I would have no difficulty in finding the south line of D street its entire length; but the difficulty I would have would be in getting around block 24, all the way round it; to make it come together, and that wouldn't place according to True's notes, the north line of block 24 and further north than it would be at starting point. So there would be no difficulty in finding the south line of D street. (Answering questions by the court). But if you try to make each one have the lots that were allot-ed to them in block 24 you would have trouble in making that agree with what the south line of D street is. Going according to these measurements around the block, it misses, say we start here and wind up here, about 9 feet east; if you were to continue on up you would be about two feet easterly. (Answering questions by the court). You would be two feet east
and nine feet south, yes sir. But that wouldn't make the
143 north line of block 24 any further north.

The map referred to by the witness, marked plaintiff's exhibit M, is introduced and admitted in evidence which is hereto attached and here made a part of this statement.

(Here follows map marked p. 143*a*.)

Thereupon the said witness gave the following testimony on cross examination, and none other, and the following proceedings were had and none other.

WITNESS: In speaking of the south line of D street I have spoken of the theoretical south line, according to True's survey; have been talking about True's notes. According to the notes, the initial point of True's survey was the line of buildings on the west side of First street. (Map shown witness). Referring to the map before me, same being the one I made, and looking at the inner red line and the black line inside of the inner red line, I say I made that plat at the time the old buildings were still standing, except as to Scully's old building. It is practically fifty feet between the red line and E street on lots, 1, 2, 3, block 24. According to True's survey, from the north line of E street over to south line of D street, the line varies. The inner red line is in accord with the
144 actual occupancy of the buildings as they stood prior to the fire. I made this map because these owners here appeared before the council and asked for a survey of that block, and I was ordered by the city council to make it. I submitted this to the council, this plat to them, illustrating. As city engineer, I found a plat of the city which ante-dates True's survey. Found it at the court house, on record; it was a certified copy of the plat; from this certified copy that I found, I made the blue prints; the document you now have is one of the blue prints; (Identified as defendants' exhibit I). In addition to defendants' exhibit I, for identification, I found from the records to which you refer, another plat of the city of Lewiston, purported to be a plat; made blue prints of it; the document you show me is the blue print to which I refer; this blue print is made, to show its accuracy,—the original is made on a transparent tracing cloth, and reproduced on sensitized paper by sun light, so they are exact copies. According to True's survey, block 24 is—I don't know exactly how long. If I take the block notes, it is 200 feet and if I give the lots the width called for, I think it is less or more, I have forgotten which. There is a
145 discrepancy; they don't correspond; that is in the copy I was working from, this copy of the field notes. The lot notes I have not compared. Since I have been in Lewiston, no part of the land that was actually occupied by the old buildings of these defendants, was used as a street. I am city building inspector of Lewiston.

Answering questions by Mr. Tweedy the witness continues:

WITNESS: I mean by saying the length of block 24, not agreeing with the field notes—I will show you. I will have to see the notes. Well, we will take D street for instance; that is what we are talking about; this has reference to the width of the lot or the frontage on D street of twenty-five feet, the frontage of two is twenty-five; the frontage of lot three is twenty-five; the frontage of lot four is twenty-five feet; the frontage of lot five is thirty feet; lot six is twenty-nine feet; lot seven is thirty feet; that is on D street. It is 197 feet—three feet short. But that wouldn't make any difference as to the south line of D street. If you gave them all the amount that their

lot calls for it would not make any difference in the south line of D
street. That is the frontage of D street. It might make a
146 difference with other streets. It would be a question of ap-
portioning the lots according to the owners, yes.

Answering questions by Mr. Smith, the witness gave the following and no other.

WITNESS: I say the theoretical size of block 24 is 200 feet on the block notes; and 197 feet the actual measurements. Also in the field notes around the block, there is a discrepancy.

Answering questions by Mr. Tweedy, the witness says:

And if you take into consideration the fact that Moxley is out 2.2 feet into Third street, according to the notes, the discrepancy would be made worse, because there is too much land in there now and 2.2 makes it still more.

Witness excused.

Thereupon Mrs. MARTHA I. NICHOLS was called as a witness on behalf of the plaintiff, sworn, and gave the following testimony and none other.

Examined by Mr. TWEEDY:

WITNESS: Name, Martha I. Nichols; residence 238 Main street, Lewiston, Idaho. Have lived there since April. Am acquainted with the Scully building. Know its location—have a lease on it—the two upper floors and the basement; am acquainted with the north
end of that building and the surroundings and have exam-
147 ined the buildings lately—day before yesterday and noticed
the brick buildings to the east of it.

The building extends north of the Scully house. Am acquainted with the windows on the north end of the Scully building, and the Fix building is—I never noticed the distance; the windows—the Scully building is, it has two windows and a door in the north end; door in center. We rent the rooms for lodging house purposes. Building that building to the north there, does not have any particular effect in damaging the rental of the rooms, only the view of the place wouldn't be so pleasant; looking up D street you couldn't see. You could see some distance by looking out of the north window, having it up. I don't know as I ever noticed as I could see if the window was raised and my head were out—I never noticed. You can hardly see any of the sidewalk by the window—to the east on the same side of the street. Although I never tried it since the new building was there. I couldn't see very far when the old building was there. Rooms renting with frontal on Main st. rent better than if they were obstructed, when they are unobstructed. People
like a pleasant view from the window. Those rooms can be
148 rented for more when they have a pleasant view of the street.
If I were renting that Scully building and if the symmetry along the street were not broken, if it were out along even with Fix building, I think it would look better. It might make a difference with some people with the rent. I don't know how that would be.

On cross examination the witness gave the following testimony and none other and the following proceedings were had:

WITNESS: We have had those rooms a year and four months; that is we occupied the building that long, and we have it now till the 1st of March. We were there when the old building of Mr. Fix was standing; that was a high two story building; had a high roof on it and I think so far as the light is concerned, so far as the windows are concerned in the Scully building, the old building shut off as much of them as the new one does; that is, from the upper floor; from the second we couldn't see the roof of the building. From the third floor you could look down, and the end was built up square. I don't know whether as the old building stood, you could see more or less than can be seen with the new building there;
149 as the old building stood with the high roof up there and the square end at the back; it was higher than the windows on the third floor, or third story, but we could see the slope. Mr. Scully has not made any reduction in our rent on account of this new building. We have rented it for the year. There could be no difference until the first of March when our lease terminates. It would be held that long anyway. The post office is down on the first floor. To the west of us there is another large frame building and it extends out quite a little distance beyond Scully's building, but not out so far as the other. It lacks, I think, just a few inches; perhaps a foot or so. We noticed it the other day; it was not so far as the other. This building to the west is also a large two story frame and it is built out so you can't stand and look out of the windows of the Scully building and see D street on account of that building there. That was the condition when we rented it—the two frame buildings were there, one on the east and one on the west, both of them extending quite high. Witness excused.

Thereupon, Mrs. AMY HAZEN was called as a witness for the plaintiff, sworn and gave the following testimony and none other:

WITNESS: I live in what is known as the Oxford Hotel,
150 over the Cash Hardware store. We have rooms to rent; have been in the business of hotel keeping since last October; am acquainted with the Scully building; the Oxford Hotel is the only building we ever used for the purposes of rooming, and which we occupy, but I have roomed in a good many and I am acquainted with the prices of different rooms. I roomed in the Scully House prior to the time the old buildings were torn down; have seen that building recently; noticed a brick building being built to the east of it; it extends north. I think the brick building extends a little further north than the old one, if I remember correctly. We occupied at that time those rooms in the north end of the Scully building, on the second floor near the Fix building. I was acquainted with the rental value of those rooms at that time. I know it was the only outside room on the second floor. The great objection to those rooms when we occupied them were, there were two, I considered. We were there during the summer months, and we got the breeze

from the east, and the Fix building cut off considerable, made our room warmer, otherwise, we would have gotten the east breeze. I was in my room a great deal of the time, stayed in my room
151 there and worked, and the view wasn't pleasant. All I could see was the back part of the laundry. The laundry is situated on the corner of Third and D; I couldn't see any east of the line between me and the laundry, no sir, not more than three feet. Whether that would reduce the rental of building, that would depend the parties taking it, if a lady occupied it who was in her room much, the first thing a lady does is to step to her window and see what view they have from it, because they are in their room and it is their home, usually; just for gentlemen, it would make no difference; just for sleeping rooms there would be no difference in the rental. Whether those rooms were rented for living rooms, I state I used the chafing dish every morning. In that way I used the room as a living room.

On cross examination by Mr. Smith, the witness gave the following testimony and none other:

WITNESS: We were in the Scully House when Bollinger kept us, when we first came to Lewiston, for about three weeks, but we were in front then; and the last time we had this room 5. I took it, I think, about the 10th or 12th of January, and was there until the last week in September. When we went there the old build-
152 ing of Fix's was standing there—the two-story building; it had a big high roof; and a square back running up, so much so that coming from the depot, it was impossible almost to see the Scully building. The new building doesn't obstruct more light than the old one, and doesn't obstruct any more of the view. On the other side of Scully's building is another large frame building. It has also, I think, that square front running up. I think it is square all around. And whether we have ever been able to stand at those side windows and look up and down street either way to any great extent. You could see from the other room opposite mine—you could see farther east—and from mine whether we could see farther west than from the opposite room—I say there isn't very far to see; on the other, you can see the edge of the building; don't project nearly so much, the edge of the building to the west, my recollection is, it didn't. And in relation to the difference, I think the new building obstructs a little more light and view than the old; for I think it projects further now. I can't say how much. I don't know how much. And whether there is usually a parlor for the ladies, I say, I think there is sometimes. The same tenants of the Scully
153 building occupied it when I was there who occupy it now. The postoffice is still on the first floor of the Scully building, and the second and third stories are used for the same purposes now as then.

Answering questions by Tweedy the witness continues: And if this new building run up to a third story, and if it runs as high as

the Scully building it will obstruct the other room on the third floor exactly as it would mine, so far as air is concerned.

Excused.

Thereupon FRANK BOOTH was called as a witness on behalf of the plaintiff, sworn and gave the following testimony and none other:

WITNESS: Live in Lewiston; am a builder and contractor and am acquainted to a certain extent with the Scully building, and the north end of such building. I have seen the building which is being erected east of it and know something of the conditions there, very close, and the building being erected east of it breaks the symmetry of the Scully building along the north front, and I should consider that damages the Scully building. It would obstruct the view looking down the street but it would not when looking straight
154 out. It would obstruct the view looking to the east, looking up or down the street. I never stood in the door in the north end of the Scully building and looked east, but the Fix building would obstruct the view—that is you can't see the sidewalk to any distance—and in order to see the sidewalk to the east you would have to go out to the projection. I think the projection of the Fix building would have something to do with the breezes entering the Scully building, and on account of not having this breeze, those rooms in the Scully building would be made warmer, certainly. It would cost approximately about $1,900 to make the Scully building have the same line of front as the building just being built there, between $1,900 and $2,000.

Thereupon, on cross examination, the said witness gave the following testimony and none other:

WITNESS: That is my estimate of the damage done to the Scully building by this act—$1,900—I would consider that was the damage basing it on what it would cost to extend the building out even with the other. Whether Mr. Scully could be paid for the damage—I don't know that I could answer that intelligently, at all. As I say, I simply would base that estimate of damage on the cost of
155 extending that out even with the other buildings. It would simply be a matter of the cost of extension, I should judge. I never have seen the old buildings, never noticed them. I don't know whether the Scully building set back in or not.

Thereupon the following proceedings were had:

TWEEDY: The obstruction of the view, is that or is it not, a damage to the Scully building as it is?

SMITH: We object to that as incompetent, irrelevant and immaterial.

COURT: Answer the question; would it be a damage?

SMITH: Exception.

WITNESS: I should consider it so, from an architectural point—that it would be a damage; it would, I consider, obstruct the breezes

and the light from the northeast and I should consider that a damage to the Scully building; if it was built out it wouldn't have the obstruction.

Witness excused.

Thereupon the plaintiff, MATTHEW SCULLY, was called as a witness in his own behalf and testified as follows and gave no other testimony:

WITNESS: I think Mr. Fix has spoken to me about he was
156 going to build a three story; that was along in the summer before these buildings were all burned down, and that has been my understanding all along, that they were all going to build three story brick buildings. And Mr. Fix stated to me before the old buildings burned down that they were going to build on the same line as the old ones, and I told him I wouldn't stand it and his reply was he didn't see as it would damage me any and called my attention to the fact that he had requested me when I started to build my building to go into the council and get permission for us to build out there and he said he had also spoke to Mr. Moxley and Mr. Squier, and he said Mr. Squier kind of laughed about it, and I didn't make him much reply. The conversation ended with my telling him I wouldn't permit him to go out there, if there was any law to prevent it. Before commencing this action, I didn't tell them anything except what I had theretofore told them, that I wouldn't permit them to build out there, if there was any law to prevent it, and I also asked one of the council to post me if there was anything going on, that I wanted to oppose it in the council, not to pass any ordinance without letting me know, that I might appear before
157 the council and oppose it. That was to Mr. Morey. Just as they commenced to lay the first stones, I went around to the north side of the building. It looked from Main street as though they were out past the line, and I went around on the north side of the building to see, and I saw they were, and says I, what are you building that foundation there for? Mr. Fix, he says, I am going to build my building there; says I, I told you I was not going to permit this and he repeated that he didn't think that I had any reason to complain about it, and I told him I would stop him if there was any law to prevent it, it would damage my property to such an extent I wouldn't stand it. At that time there was but little work done there; probably there was a half ton to a ton of rock there, laid, was all; and practically all that has been done there has been done since the commencement of this action. The building is now up one story and commenced on the second. I think he is about a story and a half; that is above the street. I wasn't back on D street to notice it; it might be higher than that on Main street. The openings in the north end of my building is a double door, a window on each side of the first story which is occupied by the post
158 office and the second story, there are three windows, one in the hall and one in each bed room, then the third story there

are three windows, one in the hall and one in each bed room. The windows in the bed rooms on the east side, next the Fix building are approximately four feet from that building; you can not lean out of any of the windows and see up the sidewalk to the east; not to any distance; you could for a few feet at an angle. And if these buildings were back to the line of True's survey, you could see up the sidewalk to fourth and fifth streets. You could see all the way up. Standing in the door of the lower floor, you can see across D street, northward and northeast but you can see directly east. To the northeast you can see, I presume, about what would extend down to the east end of the Fix block, in other words, you couldn't see to the intersection of fourth and D streets. And if these obstructions were not there, you could see to the intersection of fourth and D streets. You could see the sidewalk to the east of you. I would have to step out to the sidewalk if I wanted to see the intersection of Fourth and D streets and the south side of D street to the east of my building; have to step out a few feet. This obstruction of view, to which I have testified, has a serious
159 effect so far as damages are concerned; for this reason, that people coming from the depot, they can't see the sign on the firewall—the north firewall of the building—the new building will obstruct the view of that sign, in crossing D street, so they can't see the sign. They might see a few feet of the north end of the building, a few feet of the west end, but not enough to read any sign. It would be a damage to the occupancy, as soon as the present lease runs out; unless the lease would be out it would damage the rental value.

Cross-examination:

The witness testified as follows; I said the other day that the amount or extent of damage it would cost to build my building out is the damage. I told you I thought I was damaged to that extent; that would be I think somewhere, I am not competent to judge, from $1500.00 to $2000.00; $2000.00 would cover it anyway. If I were to build out to this obstruction, the heat, light and air would be done away with. I say when I built my building where it is, Mr. Fix wanted me to go and get the privelege before the council. He didn't want me to do anything out of the way. When I put my building in there, Mr. Fix's building was to the east and
160 Mr. Grostein's building to the west. And Mr. Fix's building was a two story frame with an A-shaped roof with an end to it. It was not as high as a three story building, or as the new three story will be when finished. The peak of the roof of the old building was not as high as my fire wall; the Grostein building to the west is also a high building—but not as high as the Fix building, because it has a flat roof; it has a square end—a fire wall, but it doesn't run as high as the peak in the center. These buildings were there when I built. They, I think, were there when I first knew the premises in 1877. I think it is 50 feet from my building across to Dr. Moxley's lot 3, block 24. Dr. Moxley's building being

that far away, would not obstruct the light and view but very little. So far as Dr. Moxley's building is concerned—all of them together is obstructing my light and air. His separate building is not up so far, only the foundation. (Answering questions by the court.) Moxley's building won't obstruct my view if Fix's building is permitted to set out, but very little. And if Fix's building wasn't out, Dr. Moxley's building wouldn't obstruct my view and light but very little. The distance from my build-
161 ing to Squier's lot—lot 2, block 24—is about 80 feet, I think, and as to that building away off there, it would affect my light and view very little; the further it got away the less it would obstruct; and at that distance—I think anywhere in the block—would be some damage to the building. The post office hasn't moved out because of this obstruction, but I don't think the government knows anything about it; when I rented the building, the tenants saw its location, as to being back in there, so far as those two old buildings were concerned.

Witness excused.

Thereupon the witness, F. W. KETTENBACH, was called and sworn and gave the following testimony and none other:

WITNESS: Name, Frank W. Kettenbach; have bought and sold real estate in Lewiston; am familiar with values in the city; know the Scully building; have seen the condition at the north end on D street in block 24; have seen the new brick building there; I believe the Scully building, by reason of the new brick building extending further north, is damaged; I believe there is a substantial damage; that wall of the Fix building extends practically at right angles north on the same line as the east wall of the Scully
162 building; as near as I can see by my eye. I examined the Fix building as to its construction—by reason of its standing out beyond the Scully building, it obstructs the view; it obstructs the view with reference to D street; I think it does not interfere with egress from the Scully building from the east. It does not with the coming and going, in or out, of the Scully building.

On cross-examination the witness testified as follows:

WITNESS: I was acquainted with the location before Scully built, but I don't know where the lines were. I remember that Mr. Fix had a large two story building there, with a roof on it, adjoining the Scully building; and a fire wall or front of the building extending straight up and above the north end and south side—a wooden wall. I am acquainted with the Grostein building and it is also a large two-story frame building, built high—with a high north front extending up. I think this high fire wall, or front, or extension or store front—there extends up higher than the third story of the Scully building, about. Have been in Lewiston 26 years. The building to which you refer of Mr. Fix was built after I came
163 to Lewiston, but it has been there a good many years. The Grostein building was built after I came to Lewiston; 26

years ago would be 1879; my recollection is that both these building were built after I came here. I am pretty positive of that withou looking at any records. They were both built shortly after I cam here, they were both built within the first two or three years afte I came. I was acquainted with the old building of Bunker & Squier I think that was the same building that was there when I came. don't remember any building replacing it. I was also acquainte with the wooden building of Moxley which burnt down. I thin that was built in comparatively recent years. The Moxley bric was built after I came here, a good many years ago.

Answering questions by Mr. Tweedy, witness continues:

WITNESS: Ever since I have been here people have been travelin along north of these buildings I refer to, going backward and fo wards, and that is used as a street and thoroughfare by the peopl of Lewiston and the people generally. That is the street the Bollin
ger hotel is on. This is about a half block away from Bo
164 linger. Thereupon, it was conceded that the sidewalk ther was built in conformity with the buildings because it couldn be built any other way.

WITNESS: There has been a sidewalk there in quite recent years that is used at the present time by the public.

Witness excused.

Thereupon WILLIAM BOLLINGER was called and sworn as a wi ness on behalf of the plaintiff and gave the following testimon and none other:

WITNESS: Name, William Bollinger; am one of the proprieto of the Bollinger hotel; have been here nine years and run the hot over five years; have been engaged in renting rooms in connectio with my hotel in Lewiston. Am acquainted with the Scully buil ing; know the condition of the north end of that building wi reference to the Fix building. The Scully building is, in my opi ion, damaged by reason of the Fix building extending north, ther that affects the rental value of the rooms, as they are not so desirabl consequently it will not bring the price that a room does where th view is better; that view of those rooms is obstructed and with refe ence to D street, it cuts off the view partially. I think the break
the symmetry in D street by this line of buildings is a dama
165 to Scully's building. I don't know whether the defendan buildings are damaged or not.

On cross-examination the witness gave the following testimon and none other:

WITNESS: Scully's building, when it was built, was back in the between two frame buildings. Those two buildings extended up about the third story windows. You could see more of D street wi the frame buildings than you can with these buildings. The bri extends out further.

Q. How much further?

A. I couldn't say, only I know it extends out further.

A. You don't know whether it is three feet or five feet further?

A. It is less. And I remember that both of those frame buildings that were there had a wall that ran to the highest part of the roof. The Grostein building on the west runs up to about the top of the windows on the third story. These new buildings don't obstruct it any more on the west than they do on the east by reason of the fact that the brick building is out farther than the old frame was. I can't say exactly how much further out but in my estimation
166 about twice as far as the frame was. My judgment is that the frame building didn't extend out but half as far as this brick building; and if it should develop that the bricks are on the same line as the frame, it wouldn't obstruct the view any more than the frame; have been here over nine years; these frame buildings were standing there since I was in Lewiston. There was always a sidewalk along the south side of D street there.

Answering questions by Tweedy:

I have rented the Scully building for about two years when those old buildings were there, and I saw that the obstruction of the new buildings is more than the old ones.

Answering questions by Smith:

I think is is approximately 50 feet across to Moxley's lot.

Q. Well, you don't claim the building on the Moxley lot obstructed the light and air and view of the Scully building?

The COURT: If the others wer-n't built?

A. Well, I don't know how to answer that. If they were all back as far as the Scully building the view would be all right, and the view wouldn't be obstructed; you could see the sidewalk. It is about 75 feet from Scully's building to Squier's. A building
167 three stories high on the Squier lot 75 feet away from the Scully building would obstruct the light and view partially, if the others were not there but it would not amount to very much that far away.

Witness excused.

Thereupon B. W. RATCLIFFE was called and sworn and testified as follows on behalf of the plaintiff and gave no other testimony:

WITNESS: Name, Benjamin W. Ratcliffe, residence, Lewiston; have lived here about six months; know Mr. Fix and Mr. Moxley, slightly; am a letter carrier on route No. 3, this city. I work in the Scully building, I have a desk at the back part of the building, right next to the edge of the window; that is the northeast corner of the building. From that window you can't see up D street, at all, from my desk. The reason is that the next building projects out so far you can't see up street. You can see as far as the wall, but if you want to see up street you must go out into the street to do so. If those buildings were on a line with the Scully building I would be able to see from the rear end of the Scully building as far up D

street as the Cash Hardware store which is in the next block,
168 the Bollinger hotel below it, along in there, and on the south side of the street, I presume I could see a block or more. I had a conversation with Mr. Fix, but don't just exactly remember the date; talked with him about the building. It was about, I think, in the last week in September. I remarked about his building there, that I had heard something about the line being in dispute, and I asked him if he had more than his deed called for and he said yes, he had four feet, but that all the rest of them, up there, had just that much, and I told him I had a case just like that back in Wacon, Iowa, where the property I owned had been formerly church property, and they had maintained a line for 40 years, but that I was four feet beyond what the deed called for, and that upon my purchasing the property, the suit was brought to maintain the line, upon ordering the new sidewalk in there by the city and that I had to get back and there was another case there, the Grand Hotel, that was out eight feet in the street—I told Mr. Fix that, yes sir—the Grand hotel was out 8 feet in the street, and when they went to build the blacksmith shop back in the same street and in the same block, they made them tear out the wall and put it back on the line
where their deed called for. I told him that the city did that.
169 He wondered what could be done, if anything, and I said nothing would be done by the city, probably, that would give him a right to build, unless they vacated the street; he said, well, then, they will have to vacate the street. He said about that increasing the property for taxation—he made that remark; that it would benefit the city in one way, they ought not to complain, that if allowed to build out there, it would make his property more valuable, and it would make more taxes for the city.

Thereupon on cross examination, the said witness gave the following testimony and none other:

WITNESS: I have been working here six or seven months. I am from Wacon, Iowa. That town was started in 1851. It is over 50 years old. It was laid out and platted by the several residents there, as they owned different properties, and was not entered under the townsite acts. The town is built on lands that the individuals took and got patent for. When I came here this old building of Fix's was still standing. Grostein's building to the west is still standing, to the west of the Scully building. I noticed these old frame buildings there when I first came. I have not been working in the postoffice department a great while, just a little while.

170 Excused.

Thereupon the counsel for respective parties agreed that the answer might be amended to show the payment of county, state and municipal taxes, all of such taxes as were levied upon the property in controversy.

Mr. TWEEDY: They can prove that they paid all the taxes on the property that the lots cover. If it is a fact they were paid on the

improvements, I wouldn't object, but I don't know whether I could admit this or not, because I don't know what the tax certificates show.

Thereupon H. SQUIER was called as a witness on behalf of the plaintiff and gave the following testimony and none other:

WITNESS: I am one of the defendants in this case. It is our intention to build our buildings with the building that Mr. Fix is now erecting. I was acquainted with the property that the Scully building is on, prior to the True survey, as I have live here since 1869. I don't recollect whether or not there was an inclosure back of the Scully building, as it then stood.

You mean an enclosure at the side? Just at the north?

Yes, there was an enclosure there. It extended, I should
171 judge—of course I don't exactly know the points of the compass, but it extended out I should judge, from the building that was there, on the block, it must be six or seven feet, perhaps.

Further north?

Yes sir. And as to whether or not it extended still north of the Fix building, I don't know as to that. I don't know whether the garden fence to which you refer would be on an exact line with the Fix building or not, but I know there was a small enclosure there or flower garden, and I think a large tree stood in there at one time. The Scully building I speak of now was the some one he tore down when he erected his new brick building. And this enclosure extended out six or seven feet north of that building, into what is called D street, something like that; went into his house and stopped. I think it was enclosed at the time True ran his survey in that way, I think so, I don't recollect—it was there a long time. And I think Mr. McGrane occupied it at that time. I think it was enclosed with a picket fence, all around, and I think there was one big tree that stood out that was afterward cut down. It was planted by some one, a poplar tree, and had to be planted by some one. Every tree in this town has grown since I came here,
172 every one. I don't recollect whether or not there was a gate leading out of this enclosure. There was a little porch that went into McGrane's back door, and I think there was a gate there to it. I don't recollect that at the present time.

And on cross examination the witness gave the following testimony and none other:

WITNESS: I should judge that the McGrane lot came out as far as Mr. Fix's building, as I understand this garden was to make the line correspond with my saloon and Moxley's building And that line with Moxley's building has been the street line since we have used it, since the early sixties. I don't know who used it as a street line, everybody could go over it. I had the use of it, too, in one respect, because I had a set of hay scales clear out in the street a good many years. The proposed building I have is simply on the line of my old building; the building that burned

up was built in 1868. I was in the states that winter, when it was built, but it was built in 1868, and I bought in there in 1869. I used to be clerk of this court years ago, and I was also treasurer of the city.

Do you remember after True's survey, when all you peo-
173 ple applied for your lots?

TWEEDY: I object to that; I didn't go into that.

TWEEDY to the witness: Was the building that was on the Scully lot, at the time you speak of this enclosure being there, was it five or six feet south of the north end of Fix's building at that time?

A. I think so, because I think this enclosure was made to make that a straight line. Yes, I understand you. Scully, didn't move any wooden building that was there before he built his brick. I don't recollect whether he tore that down or not -r what he did with it. I think he tore it down.

How far is the north end of the brick building south from the north end of the wooden building that was there, how many feet?

A. I don't know now how far Mr. Scully is in from the street, but I don't think it would be more than five or six feet. I think he is about where the old wooden building stood.

Q. That is, his old wooden building was out about as far as Fix's that burned down?

A. I don't recollect now, but I think that he didn't go out to the line that we all claim.

Q. How much did his building lack of coming out?

174 A. This garden spot in my judgment was five or six or seven feet.

Q. The north end of the garden line just came even with the north end of your wooden building?

A. Yes sir.

Q. Then according to that, Mr. Scully's old building must have been six or seven feet north of where the line is of the north end of your old wooden buildings, that is, his wooden building must have been south six or seven feet at that time?

A. South.

Q. Then, according to that, Mr. Scully has moved his building out further than the old wooden building, has he?

A. I don't know, I am just judging. It might have been exactly on the line for all I know.

Q. Anyhow, wherever Scully's old wooden building was, this enclosure extended six or seven feet further north?

A. A few feet further north. I don't know whether it was six or seven or three or four.

Mr. SMITH: You are speaking of that old building as you remember it at that time?

—. Yes sir.

175 Q. You are not speaking of any of the additions that were put on it afterwards?

A. My opinion is that that was put up after Judge Clark rendered

his decision that certain things in the street belonged to the parties, and that that fence was put up afterwards.

The COURT: Mr. Squier, was that fence put on the line with your building, as you remember it?

A. That is what my intention was, that I was on the line, and came out to it.

Answering questions by Smith: That fence was put there after one of Judge Clark's decisions and we intended to get them on a line.

Answering questions by Tweedy: All these buildings, we propose to erect are three story buildings.

Excused.

Thereupon the following occurred and the following was said:

SMITH: If the court please, before calling any witnesses we will offer in evidence the block notes and the field notes of E. B. True as affecting block 22 and 23 of the city of Lewiston according to the
176 E. B. True survey, to show the south line of D street as he delineates it, and follow this up with proof that the south line of D street has run through buildings that have always been in the possession of tenants and that the south line of D street as well as in block 24 cuts into every building that has since been erected or constructed.

COURT: You offer to show that this line that they claim this Scully house is the north end of that, that line would, in running on through would run through buildings three or four or five feet, that are now on them, and have been how long?

Mr. SMITH: One building run through, of Ransom Coburn, since 1868, and will cut off three or four or five feet from that.

COURT: I understand Mr. Tweedy objects to this?

TWEEDY: I object as incompetent, irrelevant and immaterial; that the True survey shows the boundaries of that street and the fact that the buildings are on there is immaterial, and for the further reason that buildings being on these blocks east of this block is immaterial, and don't make any difference in the case.

COURT: I shall let it go in and look into the evidence. It might be if they have gone ahead and let hundreds of thousands of
177 dollars be put on the line, that the city has let that go on for 15 or 20 years, whatever it is, that the court would hesitate to tear down these buildings, or order them torn down, and it might possibly be something to aid the court in determining the correctness of the True survey. If these buildings were on there at the time the True survey was made, it is not likely he would aim to run through the buildings in surveying the street.

TWEEDY: Exception.

And the notes of the said blocks 22 and 23 are as follows, to-wit:

Field Notes of Block 22.

Begin at northwest corner block 21 running
N. 86¼ W 80 dist ft., set stake at N E corner block 22.
N 86¼ W 200 dist S side D name, set stake at N W corner block 22.

S. 3½ 48½ dist E side 4th name, set stake at S W corner block 22.
S 86¼ east 200 dist N side E, set stake at S E corner block 22.
N ½ 50¼ dist N side 5 name to set stake at N E.

Field Notes of Block 23.

Begin at N. W corner block 22, running
178 N 86½ W 80 dist ft, name, set stake at N E corner block.
N 86¼ W 202 dist ft S side D name, set stake at N W corner block.
S 3½ W 46 dist ft E side 3 name, set stake at S W corner block.
S 86¼ E 202½ dist ft N E name, set stake at S E corner block.
N 3½ E 47½ dist W side 4th name to N E corner block.

Field Notes of Lots in Block 22.

Lot.	Side.	Length.	Area.	Equiv. 50 x 100.
1	5th	50		
	D	100		
	1 and 2	49		
	E	100	4950	.99
2	4th	48½		
	D	100		
	1 and 2	49		
	E	100	4875	.976

Field Notes of Lots in Block 23.

1	4th	47½		
	D	55		
	1 and 2	47		
	E	52½	2538	.5076
3	D	24½		
179	3 and 4	46½		
	3 and 2	47		
	E	24½		
4	D	26		
	4 and 3	46½		
	4 and 5	46½		
	E	26	1209	.242
5	D	24½		
	5 and 4	46½		
	5 and 6	46		
	E	24½	1127	.225
6	D	25		
	3d	46		
	E	25		
	6 and 5	46	1150	.23
2	D	46½		
	2 and 1	47		
	2 and 3	49		
	6	49	2250	.45

SMITH: Will you admit that block 23, that is from beginning at the west end, which is on Third street opposite Dr. Moxley's, the first being Charley Parker's saloon, the next building, John P. Vollmer's new building, the next building being an old wooden building, occupied by Coburn, the next one being a building belonging
180 to the Binnard estate, but now belongs to Annie and Amelia Binnard, and the next building being the Thiessen building, a large three story modern building, will you admit that building is 50 feet north and south—those buildings?

TWEEDY: I don't see how I could admit those things. I think they are immaterial. I don't know anything about those facts except in the last five or six years, individually. I don't want to admit something that will be damaging.

SMITH: I can prove these things.

TWEEDY: I would like to intr-duce a little more evidence.

Thereupon the plaintiff called Hazen Squier who gave the testimony heretofore set out.

Thereupon HAZEN SQUIER was called and testified on behalf of the defendants and gave the following testimony and none other, and the following proceedings were had and none other:

WITNESS: My wife is a defendant here. I first came to Lewiston in 1865, but came here to reside in 1869. I went into the saloon business and have been running that saloon since; that was known as the Bunker & Squier saloon; also the O. R. & N. When I bought in, I think it was called the Exchange; have lived here right
181 along since 1869. I remember very well when True's survey was made.

Q. Do you remember the south line of D street as it existed before True's survey?

TWEEDY: I object; it is immaterial to show that.

COURT: I understand him with reference to where the buildings were; with reference to the True survey, and I think this is something I will hear. I stated heretofore that I would as to where the buildings stood at the time of this survey, and what has been done afterward.

TWEEDY: Plaintiff excepts to the ruling.

WITNESS: I don't know about the south line only as the line we used, that the buildings conformed to, and my building was supposed to be right on that line of D street; my building was built in 1868. Document handed witness. This is my signature; it is in the handwriting of D. J. Warner, who was city clerk here at that time. The signature on the back is Henry W. Stainton's. I have seen him write; he wrote left-handed. Another document handed the witness. This document is my application for the purchase of that lot 2.

Said document was thereupon offered and admitted in evi-
182 dence and is in words and figures as follows:

"To the Mayor of the City of Lewiston, Idaho Territory, Trustee for the Inhabitants of Said City, Under a Patent from the United States:

"I, H. Squier, hereby make application to the mayor trustee, for a title to the following lands, as described in the plat of the city of Lewiston, I. T., recorded in accordance with section 1st of an act to provide for the survey, platting and disposal of the land in the city of Lewiston, county of Nez Perces, territory of Idaho, pursuant to the United States statutes, made and provided, passed by the legislature of the said territory, approved January 8th, 1873, to-wit: That piece or parcel of land lying and being situate in the city of Lewiston, and described on plat of said city as follows: Commencing at a point seventy-five (75) feet north of the northeast corner of 2nd and C streets; thence north along line of 2nd street thirty-one (31) feet; thence east one hundred feet; thence south thirty-one (31) feet; thence west along line of lot No. 7, block 12, one hundred (100) feet to place of beginning, and designated on plat as lot No. 6 in block No. 12, the same containing 3100 feet equ. 62 of one lot. I would also make application for the following described piece or
183 parcel of land in the city of Lewiston, bounded as follows: On the north side of E street, commencing at a point twenty-five (25) feet west from the northwest corner of E and 3d streets, thence west along line of E street twenty-five (25) feet, thence north along line of lot 3, block 24 fifty-five (55) feet, thence east along line of D street twenty-five (25) feet to place of beginning, and designated on plat of city as lot No. 2, block No. 24, the same containing 1131 feet, equiv. 226 of one lot.

"I hereby certify that I am the actual *bona fide* occupant of said premises, and such occupancy consists of my actual residence with fencing to enclose lot No. 6, block 12, and a building occupied as a business house on lot 2, block No. 24.

"H. SQUIER."

TERRITORY OF IDAHO, *County of Nez Perces, ss:*

Personally appeared before me this day H. Squier, who being duly sworn, deposes and says that the statements in the foregoing application to the mayor of the city of Lewiston Idaho Territory, trustee for the inhabitants of said city for land described and included in a patent for the same to him said trustee from the general government of the United States of America, are true of his
184 own knowledge, except as to matters therein stated upon information and belief, and as to those matters he belives them to be true.

H. SQUIER.

Subscribed and sworn to before me this 17th day of July, A. D., 1875.

D. J. WARNER,
City Recorder.

Endorsed: Application for title to lot No. 2 block No. 24, lot No. 6, block No. 12. H. Squier. No. 95. Filed July 19, 1875. Henry W. Stainton, Mayor.

WITNESS: Another document shown witness. This is a deed signed by Henry W. Stainton, mayor of the city of Lewiston, Nez Perces county, Idaho Territory. I have seen this before. Document introduced in evidence, same as certified copy heretofore introduced, for lot 2, block 24, city of Lewiston and omitted here as it appears elsewhere.

SMITH: I will offer in evidence an abstract, and offer to show by the record of a bonded abstractor, in which he certifies that all taxes are paid. I want to prove he has paid all taxes on his property right along, whatever he owned, and that his belongings have been known as and called lot 2, block 24.

185 TWEEDY: I am willing that this may go into the record, that he has paid his taxes down there on that property, but I am not willing to admit that he has paid taxes and that taxes have been assessed against him on the number of feet beyond the line which True drew through there, in other words, the four and one-half feet, the north part of the lot he is claiming; I won't admit that.

COURT: Whatever the description of the land is that is what he would pay taxes on, and I don't think there can be any other way to argue. If a man has a lot described as lot 2, and it is shown that the taxes are paid with the improvements, whatever they are, all taxes are paid on whatever was on the land. I don't see how you can argue that would necessarily go into the street, or wouldn't. It is whatever the lot covers and I don't think there can be any misunderstanding.

TWEEDY: With that understanding, I haven't any objection to him showing he has paid all the taxes there on this property.

COURT: Whatever his description covers.

SMITH: We offer to show that his belongings have always been called lot 2, block 24.

WITNESS: I never saw any plat of the city, that I know of,

186 before the one known as True's survey.

Excused.

Thereupon J. Q. MOXLEY was called sworn as a witness for the defendants, gave the following testimony and none other and the following proceedings were had and none other:

Examined by SMITH:

WITNESS: Name, John Q. Moxley; age 58; residence, Lewiston; have lived here 32 years; am a defendant here; own brick building in block 24 at present; that is the western part of the city.

It is here admitted that this witness is grantee by mense conveyance from Wesley Mulkey.

WITNESS: I knew Wesley Mulkey's signature when I saw it; have seen him write his name and am familiar with his writing. Document shown witness. This is his signature; knew him 10 years; have had business transactions with him; and the land known as lot 1 block 24 of the city of Lewiston, is the land I purchased from him by mesne conveyances. My building is on that land—the building is 25 x 50; two story brick; cost about $6000. That building has

been there about 20 years; that is the brick where my drug store is; and this new building I propose to build is on the line on D street with my old one and my new building comes out to
187 the distance that my present building does; and covers simply the ground where my old wooden building stood.

And the witness referring to Wesley Mulkey's application says:

This is Stainton's signature; he was mayor-trustee at that time.

Thereupon the defendants offered the application of the said Wesley Mulkey in evidence.

TWEEDY: I object to this application as being any evidence whatever of the fact of extending the lines of this lot beyond the True survey. I object to all these applications for that reason, and for the further reason that the city or mayor, could not make any deed to property beyond the True survey to anybody; that the title had already passed and vested in the city of Lewiston, by reason of the survey and by reason of the platting.

COURT: I think it is something they have a right to have in on their side of the case. I think they may show the reason why they are building so. It is a fact I want in evidence and I shall overrule the objection.

Plaintiff excepts to the ruling of the court.

Said paper is admitted and marked defendants' exhibit 4 in evidence, copy of which is as follows:

188 To the Mayor of the City of Lewiston, Idaho Territory, Trustee for the Inhabitants of said City Under Patent from the United States:

I Wesley Mulkey, hereby make application to the Mayor Trustee for the inhabitants of said city of Lewiston, Idaho Territory for a title in fee to the following land, as described in the plat of the said city of Lewiston, recorded in accordance with section one of an act to provide for the survey, platting and disposal of the lands in the city of Lewiston, county of Nez Perces, and Territory of Idaho, passed by the Legislature of said Territory, January 8th, 1873, and in pursuance of an act of the congress of the United States, to-wit: Lot one in block twenty-four, 25 feet by 50 feet, fronting on E street, 25 feet on Third 50 feet and on D street 25 feet. That I hold said lot by occupation and improvements, having a building thereon.

WESLEY MULKEY.

TERRITORY OF IDAHO, *County of Nez Perces, ss:*

On this 2nd day of July, A. D., 1875, I Jasper Rand, for and on behalf of the applicant, Wesley Mulkey, do solemnly swear that the statements in the foregoing application to the mayor of the city of Lewiston, Idaho Territory, trustee for the inhabitants of
189 said city, for land described and included in a patent for the same to him, said trustee, from the general government of the United States of America, are true of my own knowledge, except

as to matters therein stated on information and belief, and as to those matters, I believe them to be true.

JASPER RAND.

Subscribed and sworn to before me this 2nd day of July, A. D., 1875.

(Seal)

JOHN G. BERRY,
Probate Judge.

Endorsed: Application of Wesley Mulkey for title deed to lot 1 in block 24; filed July 2nd, 1875. Henry W. Stainton, Mayor-Trustee. No. 17.

WITNESS: When I built my brick building there it was to cover the same ground the other covered at that time.

TWEEDY: Is this the brick building?

SMITH: Yes sir.

TWEEDY: I object for the reason that this is not in controversy.

COURT: It is already in; I won't strike it out.

TWEEDY: Exception.

WITNESS: Am acquainted with that signature—it is mine.

190 Document identified offered in evidence, same being his application for his lot. Document admitted a copy of which is as follows:

To the Mayor of the City of Lewiston, Idaho Territory, Trustee, for the inhabitants of said City, under a patent from the United States of America:

I, John Q. Moxley, hereby apply to the mayor trustee for a title to the following lands, as described in the official plat of the city of Lewiston approved June 22nd, 1875, and recorded in accordance with section 1st of an act to provide for the survey and platting and disposal of the land in the city of Lewiston, county of Nez Perces, Territory of Idaho, pursuant to United States statutes, made and provided, passed by the legislature of said Territory, approved January 8, A. D. 1873, to-wit: Lot 3 of block 24, described in the field notes of said plat as follows: Beginning at a point fifty feet westerly of the southeast corner of block 24, on the north line of E street, and extending westerly along line of E street twenty-five feet, thence northerly between lots 3 and 4, forty-six feet, more or less, to the south line of D street, thence easterly along south line of D street twenty-five feet and thence southerly forty-five feet, more or
191 less, to place of beginning. I hereby certify that I am the *bona fide* occupant of said premises, and the character of such occupancy consists of actual residence upon said lot.

JOHN Q. MOXLEY.

TERRITORY OF IDAHO, *County of Nez Perces, ss:*

On this, the 15th day of July, A. D., 1875, I do solemnly swear that the statements in the foregoing application to the mayor of the

city of Lewiston, Idaho territory, trustee for the inhabitants of said city for land described and included in a patent for the same to him, said trustee from the general government of the United States of America, are true of my own knowledge, except as to matters therein stated upon information and belief, and as to those matters I believe them to be true.

(Signed) J. Q. MOXLEY.

Subscribed and sworn to before me this 15th day of July, A. D., 1875.

D. J. WARNER,
City Recorder.

Endorsed: Application for title by J. Q. Moxley to lot 3, block No. 24, No. 85. Filed this 15th day of July, 1875. Henry W. Stainton, Mayor.

192 WITNESS: At that time I was in the occupancy of all that land I seek to build on now, and have continued to be in the actual occupancy of it; I have owned it since '75; I bought it in 1874, that is lot 3, that is the Kelly lot, where Kelley's old drug store was; that is where Mrs. Eben Mounce's father used to live; none of the lots I have had possession and claimed since the issuance of the deeds have been used as street; my buildings are up to the point of user of the south line of D street; and my proposed building is the same; my first possession was of this lot of the size I claim now; it was up to the same lines out even with Squire's lots; and that was the south line of D street as established by user; I am acquainted with and familiar with the size, north and south, of lots over in block 23, where Lowenberg Brothers' saloon or place of business was; I know the old building where Ransom Coburn's harness shop is, in the middle of block 23; that building was there when I came here in 1873; that same building, yes sir; I don't know how long that building is north and south. But it comes out to that line.

COURT: This D street, has it been used for the back entrance or two main entrances to this building? What is the other
193 street just south? What is that street along by the hill?

SMITH: E street—Montgomery street—Main or Snake.

COURT: Was there two entrances?

WITNESS:

A. In some of the houses there were, and some there wern't in early days.

COURT: Where was the main entrance?

A. On what is called Main street now. It has got now so both streets are used a good deal; beginning to be used more than they were, and there used to be in the early days, a back door, not considered an entrance, at all. The name of E street is Main, and also Montgomery. I never saw an old plat of the city before the E. B. True survey.

Excused.

MAPS

TOO

LARGE

FOR

FILMING

Thereupon CHESTER P. COBURN was called, sworn as a witness for defendants, gave the following testimony and none other and the following proceedings were had and none other:

Name C. P. Coburn, age about 74, residence Lewiston; have lived here a little over 43 years; nearly 44; came here in the early sixties, and have seen practically the whole town grow; was acquainted with Henry W. Stainton, he was mayor-trustee; I
194 remember of the city having platted or mapped or surveyed the city, before True's survey; (plat shown witness) I have seen this plat before; I would know a copy of that plat if I were to see it; was acquainted with Alonzo Leland; he was editor of a newspaper; he was also a lawyer; was acquainted with Alonzo Gilman, he was once mayor; I remember the old case of Lewiston *vs.* Alonzo Gilman; I think Mr. Stainton was mayor at that time; I remember when Levi Ankeny was mayor; looking at this plat which you show me I state I have seen the original of which it purports to be a copy.

Q. Do you know what the size of these lots were supposed to be at that time?

TWEEDY: Oh, I object, I don't think he should be permitted to make that kind of proof in this case.

COURT: What is your purpose?

SMITH: I want to show they were fifty by one hundred and the fifty foot measurement run north and south, and that block 15, on that, is 24 on True's survey.

COURT: And there was a plat already out of the city and these lots ran the longest way east and west?

195 SMITH: Yes, it will show the distance, the length of blocks 22, 23 and 24.

COURT: The original block was fifty feet across it?

SMITH: The lots run fifty feet originally.

COURT: I shall let in the evidence.

TWEEDY: Do I understand that they are trying to introduce this plat?

COURT: Yes.

TWEEDY: I object, your honor. It is a copy, and there is no showing as to where the original is. For the further reason it is hearsay evidence, and it is not admissible in this case at all.

COURT: I shall admit it in evidence, a plat they went by prior to patent.

Exception.

Said document or plat is admitted in evidence, as defendant's exhibit 6, which is hereto and hereat annexed and made a part of this statement.

(Here follows map marked p. 195*a*.)

I remember that the original of this plat you have shown me was used with reference to property rights, ownership, etc., at that time. I have a son that is in business here, by the name of Ransom Coburn; he was born here; he is in the harness and saddlery; he is in business between Third and Fourth streets and
196 Main; he is in the block right this side of the Moxley block —this side of the new Vollmer building; I remember when that building he is in was originally built; it was in 1862.

TWEEDY: We object to this; it encumbers the record, and is incompetent and immaterial.

COURT: I thought we had an admission that this line if run, cut off three or four feet of block 22 and 23.

TWEEDY: I think that is true, in the way those are built, in some parts.

WITNESS: This building was built in 1862; I have measured that building recently north and south; I did not step it the other day at your request; I know the measurement north and south; it is 25 by 50, intended to be lacks a few inches both in width and length; it is not out quite so far on E street. The lot my son's building or place of business is on, is near the center of block 23—that was formerly the James Gage lot; he formerly occupied it; I remember the lot on which Vollmer's new building stands; the first building on the lot of Mr. Vollmer, was put up in 1862; I know the handwriting of John P. Vollmer; I have seen him sign his name; I know the signature of Henry W. Stainton; this is
197 Mr. Stainton's signature to this document you hand me. The direction which John P. Vollmer's old store building was from this building my son occupies, was directly west; I should take this signature on this paper to be the signature of John P. Vollmer.

Document offered in evidence and is an application for a lot in block 23.

TWEEDY: Objected to as incompetent, irrelevant and immaterial, and these applications cannot change the rights of the parties, or give the mayor any power to convey land otherwise than according to the True survey, to anybody, and that the only remedy which the occupants had was an action to compel the True survey to be corrected, if it was not according to law, as required by law; that they got their title to the property as surveyed and platted by True and in no other way, and they got no title whatever by reason of occupancy and the city got title by reason of platting and the description of the streets.

The COURT: I understand the purpose is to show all along that street they have been occupying that street so as to take about four feet of D street, that is, to make their lots fifty feet, and that
198 if this line were changed so as to make it in line with the Scully building—the purpose is to show this line would run through three or four feet of all the buildings along D street; and I stated a while ago that if you will show that the buildings had

been built upon that for a long period of time, over this four feet, that the court will admit it on the same theory I admitted that.

Mr. TWEEDY: Exception.

Said paper is marked defendant's exhibit 7 and is introduced in evidence, a copy of which is as follows:

To the mayor of the city of Lewiston, Idaho Territory, trustee for the Inhabitants of said city under patent from the United States:

I, John P. Vollmer, apply to the mayor, trustee, for the inhabitants of said city of Lewiston Idaho Territory, for a title in fee to the following land, as described in the plat of the said city of Lewiston, Idaho Territory, for title in fee to the following land, as described in the plat of the said city of Lewiston, recorded in pursuance with section one of an act to provide for the survey, platting and disposal of the lands in the city of Lewiston, county of Nez Perces, and territory of Idaho, passed by the legislature of the said territory, January 8th, A. D., 1873, and in ac-
199 cordance with the acts of Congress of the United States of America. Description of the property claimed: Lot 4 in block 23, 25x50 feet, and four inches off of the whole length of west side of lot 3, in block 23 and eight inches off of the whole length of east side of lot 5, in block 23. The whole amount claimed being 26 feet by fifty feet, fronting 26 feet on E street and 26 feet on D street. That I claim said land by occupancy and improvements, having a store thereon.

JOHN P. VOLLMER.

TERRITORY OF IDAHO, *County of Nez Perces, ss:*

On this 2nd day of July, A. D., 1875, I Jasper Rand, for and on behalf of John P. Vollmer, do solemnly swear that the statements set forth in the foregoing application to the mayor of the city of Lewiston, Idaho Territory, trustee for the inhabitants of the said city for land described and included in a patent for the same to him, said trustee, from the government of the United States of America, are true of my own knowledge, except as to matters therein stated on information and belief, and as to those matters I believe them to be true.

JASPER RAND.

200 Subscribed and sworn to before me this 2nd day of July, A. D., 1875.

[SEAL.] JOHN C. BERRY,
Probate Judge.

Endorsed: Application of John P. Vollmer for title deed to lot 4, block 237 & fraction of 4 inches of lot 3 and 8 inches from lot 5, both fraction- in said block 23. Filed July 2nd, 1875. Henry W. Stainton, Mayor Trustee. No. 23.

WITNESS: I know where Mr. Vollmer's new 3-story brick is, in the middle of block 23—erected this year—I don't know how long north and south that building is, but I suppose it is 50 feet;

it comes out to the north and on E street the same way. I knew Lowenberg Bros. when they were here and knew where their place of business is; they first did business in the place occupied by Chas. Parker as a saloon, and afterwards moved out to where the laundry is. The place where Charley Parker's saloon now is, is immediately west of the new Vollmer building, in the same block and extends to third street. It is immediately across the street from the old Mulkey lot; it is in the same line of blocks between D and E streets;

I know the handwriting of Lowenberg Bros., knew their
201 signature; also, knew the signature of Stainton, the signature on the back of this instrument which you show me, I take to be Benjamin Lowenberg; I knew the signature of both of them, he was the head of the firm; so I was acquainted with his signature. I was acquainted with that store on this lot where they did business; it was the first built of shakes and the second one of bricks; there was no log building there at any time; I couldn't tell exactly whether it covered this lot or not; I know where the building is in the same block where my son's store is, which belongs to Anna Binnard and her sister. It is directly east from my son's store; it is two stories high, runs the same distance north and south as the other buildings—and next to this Binnard building is the Thiessen building—three stories high, has been built quite recently, the last two or three years; it is one of the modern office buildings of the town; has a basement under it; and that takes us up to the street where the Lewiston National Bank block is; that runs the same distance and crossing to block 22, the Lewiston National bank building—is the first one—it was built, I think in

1889 or 1890, it was started in 1889; I know who built that.
202 Q. Do you know its distance north and south?

A. I don't any more than it is in line with the other buildings.

The COURT: It runs as far over on D street as the other buildings you have been describing?

—. Yes sir. It is three stories high, built of stone, I believe; modern office building.

Q. Returning to D street, isn't it a fact Mr. Coburn, that the line on which the north end of your son's store now is, that that was always considered the south line of D street by the citizens and inhabitants?

A. Always occupied as such.

Q. Those lines that are shown on this old plat, do you remember the size they were?

A. Those lots from the True survey were only partially occupied, and I don't know exactly the size; they were intended to conform to the line.

Q. Will you show on this map which block it is that is the same as the block now where Scully's brick building is and where Dr. Moxley is?

A. That is it.

Q. Will you give the number?

A. Block 15.

Excused.

At this time Mr. Tweedy announced that he desired to
203 call a witness to prove the enclosure.

Thereupon FRANK MCGRANE was called as a witness for the plaintiff and gave the following testimony and none other:

My name is Frank McGrane; have resided in Idaho since 1869; came first to Lewiston; owned formerly what is called the Scully block; got it from my father; he got it in or about 1870—I wouldn't say positively—was familiar with the enclosures there. I couldn't say if there was a fence there when my father bought the property or not.

Q. When was the fence placed there, before 1874?

—. Yes sir, I think it was.

Q. State how far out into the street that fence extended into D street, beyond the north end of the building?

A. I couldn't say as to that, how far it was. I know that we had—I don't think that the fence was there when my father bought the place, but I remember after he bought it that we had a little garden there, and at the outside of the fence there stood a great big poplar tree and on the left hand side as you came up, and right close to the house, we had a little tree, and used to have morning
204 glory flowers and such stuff as that on that space that extended from the door from the north, possibly from six to eight feet possibly not more than six, just a little picket fence, and came out of the door, and a little flower garden was there, and then the gate went out into the street.

Q. Was the north end of that building extending about as far as the north end of Fix's building?

A. Mr. Fix didn't have any building there then.

Q. How much further north did he build the building afterwards than your father's building was?

A. Well, I don't know. You see when I left there, my people lived there after I went away. I went away and went across to Salmon river in 1880, and I never lived there after that. My father has always kind of handled the property, and I never bothered about it.

Q. Was Mr. Fix's building there before you left?

A. Why, I am inclined to think George Glass was in there when I went away.

Q. When you went into the Fix building, did you go out of the back gate from your little garden.

205 A. He never lived there, you know.

Q. I mean the building Fix subsequently bought?

A. When we lived there, there was a little old place there, and the building didn't extend back. There was a big, high board fence that extended back about even with our building, and then our fence, our lot fence ran right east out into the street; I don't know whether it was in the street or not, but ran out north of our place.

Q. People going up the street, when they came to your garden, could they go ahead, or turn right to the north?

A. I think they would have to turn out to the left, if they were going north, and went north to go around our lot fence; I am in-

clined to think so. They could go right along the street into our back yard—a little alley through on the west side that went south right back opposite our kitchen, but this fence just made a little jog where we had our little garden. And that fence remained there up to the time that I left my father's house; if I remember right, that fence when I went away was still there, and I never paid any attention to the property, and the next thing I know, a good many
206 years, Mr. Fix rented it and looked after it, and the next thing I knew, I remember passing in there, and I noticed the old poplar tree gone, had been dug out, and the fence was gone, tore down, and the thing was cleared and cleaned through there, the street, and I know it made an impression on my mind, that old tree being gone, after being there so many years, you know.

And on cross examination by Smith, the said witness testified as follows:

I remember of True making the survey, but don't remember the year; I remember the location of the old building occupied by Bunker & Squier; I remember pretty well where the north end of that was, I couldn't say positive just where it was.

Q. The south line of D street was on a line with the building occupied by Squier's saloon, wasn't it?

The COURT: What they want to know is whether the south side of D street and the north side of these buildings, whether those buildings were on the line that ran out about the same distance?

A. Well, I could not say as to that. I know our old build-
207 ing and Fix's building—I never was there much after he built that. The old building didn't come back to the street where Fix's building is now. The old building that stood there before Fix built, it came back part way, and then a big yard and a big high board fence, that came out even with the north of our house, and I am inclined to think the Squier building was put on a line with our north line, but I wouldn't say it was. It might have been off one way or the other. I couldn't remember accurately. I remember very well when James Kearney built there, and I remember the George Glass building; the James Kearney building didn't extend back. I don't know where the south line of D street was or the actual occupancy of the lots.

Q. And you don't know that (the south line of D street) was on a line with the present line of Moxley's store?

A. The fence where we had the little garden, I am satisfied was north of all those others.

Q. How far?

—. I couldn't say, but I am satisfied our north door was along pretty close on a line with the Moxley and Squier building—more especially the Squier building.

Q. Then to the best of your recollection, the door in that
208 old Scully building was just about on a line with the Squier building?

A. Along close to it; I wouldn't be positive; might have been off a little, no great lot. Our old building is the one Scully removed when he put up his brick; that is our old building.

Answering questions by Tweedy, the witness continues:

Q. Along on D street there was places where the street was further in than others?

A. Oh, yes, I think so.

Q. A good many places?

A. I wouldn't say a good many places. I know there was an old China wash house for years stood west of us on the corner, but the sid of it faced west, and it was further in than our building.

Q. Did everybody have those lots fenced in?

A. No, I think we were the only people that had a little garden on that street.

Q. The rest was all open?

A. I think the rest was all open, except outside of the lot Kearney had; he had a fence came out even with the north end of our house, and our little picket fence extended on further.

209 Q. Some of the places on D street extended out to a certain distance, and another further?

A. I am inclined to thing so; I don't think they were all on a line. They might have been but I don't think so.

Excused.

Thereupon JAMES CONLEY was called as a witness on behalf of the defendants, and sworn, and gave the following testimony and none other and the following proceedings were had and none other.

Examined by Mr. SMITH:

WITNESS: Residence, Lewiston; age 45, came here in 1867. I have made it my home ever since, but was away once for six months; am well acquainted over the town; know Dr. Moxley's drug store, and its location; was acquainted with the old building that used to be Bunker & Squier's saloon; was acquainted with the building on the next lot adjoining; am acquainted with the lots Mr. Fix now owns; and the building that used to be there; know the present building on the Grostein lot, on the corner of the same block; I can remember that Grostein building was there as far back as 1882; but can't remember back of that much; I think I was there several years before though; I have a document in my possession which

210 fixes the date to which I refer; this one is 1884—and this one referring—is 1882; I attended the ball at that time, there, yes sir; it was in this Grostein building. The ball was held in that building at that time.

Q. How long can you remember back, that building was there on the Bunker & Squier lot?

A. It was the summer of 1877.

Q. You can remember that, can you?

A. Yes sir; I know it was there before that, but I can't remember that sure.

Q. In relation to the length of blocks, do you know the house where Ransom Coburn's shop is?

A. Yes sir.

Q. What is your earliest recollection of that building, about when?

A. That building was there in 1877.

Q. Do you know the length of those old buildings that was there?

A. I don't know exactly, but I know the buildings there.

The COURT: You can tell that has been there since when?

A. Since '77. I live now at 379 Main street; have lived there since I came here; my mother's name was Katherine Conley;
211 prior to her marriage her name was Katherine Fogarty; she could not write her name; my mother formerly owned that property where I now live; I don't know how long she owned it; I was quite small; I remember my mother living there and the buildwe had there; I remember part of the E. B. True survey as I had lived there before that; I remember my mother having some trouble with the city about—but I couldn't be positive. I know there was some trouble about it at the time; I was quite small, and it has been a good while ago; I know there was some trouble in regard to it after True had made this survey, and she made application to have the land given to her that she had bought, and was still holding. (Document handed witness). I remember of there being trouble, but I couldn't say positively of my own knowledge what it was about. Looking at this plat and locating where we lived, it is lots 1 to 6, block 21. I remember the old place where James Karney used to do business; I don't remember Conrad Witsch only was across the street; I said I remember the Bunker & Squier saloon; I remember the Heckster store; that was where Moxley's drug store is; I remember where McGrane lived; I knew the condition and situation of
212 that building that Mr. Scully moved off; I can remember of that building being there the first time in 1875.

Q. Do you remember the buildings that were over on D street that extended through at that time, as to whether they seemed to conform to a general line, to a general straight line on D street from the building where Coburn's shop is up to Vollmer's store, and down to Squier's and the next block?

A. Very near; they might have differed a little to the best of my recollection.

Q. What do you remember of the condition of things about the time before True made the survey?

A. Well, the best I can remember they were about the same.

WITNESS: I was about 14 years of age when True made his survey.

Q. You looked along the south line of D street to see if they (the buildings) were in line.

A. To the best of my memory they were, about. I knew all the time there was a wide street there.

Q. Will you say every building went out north as far as every other building?

A. Oh, I couldn't say positive that they would conform
213 all the time.

Q. You would not swear to it?

A. No, I would not swear to it, because the Glass building was small, and it was fenced out over on D street.

And on cross examination the witness James Conley testified as follows:

Q. There were places along there where there wer-n't any fences at all on D street?

A. By Bunker & Squire's saloon, there was none that came to the street.

Q. Any other places where there were no fences?

A. I don't remember any fences being where the Grostein building is. There was a small picket fence on D street where the McGrane building was. That is the old building where Squire's new building now stands.

Q. So far as you can recollect, those buildings may have come out to D street different distances? Some may have been out further than others all along D street?

A. Only two places on that street I think they came out even with the exception of where these two fences was, and to the best of my recollection, that made it about even with the property. That was the back entrance to the building that was seldom used; the main entrance was on Main street; some of them used the back entrance and some didn't; I didn't say those buildings were built the same distance north; some of the buildings was of different size.

214

Q. Some of them through there where the Scully building now stands and where the Glass building was, they were both small?

A. They had fences and they came out to correspond with Moxley's and where the others stand. The front end of these buildings was on Main street.

Answering questions by Smith:

I remember where the bends have been in Main street, yes; I remember the Whitfield Bros. also; I think their occupancy—I think Billy Whitfield—now I don't remember whether Billy Whitfield owned it but I remember Billy Whitfield working for Dr. Kelly, and he had a drug store on the property Dr. Moxley now owns and the building burned off.

Answering questions by Tweedy:

I have a deed in the city somewhere, that extends, according to the True survey, out into the street; I have a piece of property in this city somewhere that extends over twenty feet over the True survey, as they claim; I don't know that I am interested in having these lines established on the lines of occupancy; I have been in the occupancy of that land since 1874; and that is the land I got from mother, and she had the occupancy before I had it.

215

Excused.

Thereupon, the defendant, J. Q. MOXLEY, was called as a witness on behalf of the defense, and gave the following testimony and none other, and the following proceedings were had and none other.

Examined by SMITH:

WITNESS: Have heard the testimony of the witnesses concerning the fences and the occupancy in block 24 and along the south line of D street.

Will you in your own way tell the court how those things were located in block 24, where you own property.

A. Where my present store is was owned when I first came here by Mr. Mulkey. The next lot was owned by Mr. Squier. There was a log building on the first lot, with a cellar and shed coming out even to Squier's building. Then Squier's building was lot
216 No. 2, going west from my present drug store now. Then I owned the next lot west from Mr. Squier's building. That was a drug store that I bought of Dr. Kelly. He gave me to understand when I bought that my rights ran out with Squier's and there was a storehouse built there, that we kept stuff in out even with Squier's.

Q. That storehouse was?

A. Yes sir. Then the next one west of me was owned by Billy Whitefield, may be Billy Whitefield and his brother. The Whitefield brothers lived there, and they had a house there, but it didn't extend over three-fourths of the lot, but there was a fence even with Squier's building and my lot back there, there was about eight or ten feet of a yard back there in the Whitefield lot that was fenced with a picket fence, and there was a gate there, and they used to come into the back door when they wanted to, but no back entrance, and they used to keep the wood back in the lot, and beyond that, west from Whitfield's lot, was a lot owned, I think by James Kearney, who had a little cobbler shop there, and that was next to the McGrane building where there was a little bakery. Kearney's little cobbler shop didn't extend more than about half over the lot
217 but there was a fence back there on the line of our lots, made of upright boards, quite tall that jammed up against the McGrane house, but the McGrane house didn't come out quite to this fence—I don't know how far. There was a small bakery McGrane had there and the first entrance was from E street, the main entrance from Main street. There was no entrance back, only a private entrance, and McGranes had a fence there. When I began to build on the corner, that north end of McGrane's fence was on a line where I built my brick house.

The COURT: When was that?

A. That was in 1885. And that has been the line that we all held there, as the south line of D street. In the list of owners in there, I remember George Glass; I don't know whether he owned the lot west of Kearney, but he bought out Kearney when he built the big house. The Whitfield land was part of the land Fix owns; that was east of the Glass building; I know of Conrad Wintsch owning the Whitfield lot. The first lot was owned by Wesley Mulkey—next

by Squier—next by me, next by Whitfield or Wintsch, then the Glass lot, then the little building of Kearney; whether it was the Glass or the Kearney, I don't know, but Kearney was in there
218 first; then the next was the lot where Scully owns that was the McGrane lot; and the next lot is where McGrane is now; I remember that where Kearney's shoe store was that from there out north to D street he had a little four foot alley; and that would throw the Glass lot right up against his, and his against Scully's; they had small lots; how large they were, I don't know, except where they came out to the north fence which was an upright fence. When I built my brick building I sighted along the street many times, because I was interested in the question along that line.

Thereupon on cross examination, the witness gave the following testimony and none other and the following proceedings were had and none other.

Q. When was it you came into Lewiston?
A. 1873.
—. When was it you built the brick building?
A. I think it was in 1885.
Q. And was that the condition of things you testified along there in block 24?
A. Yes sir.
Q. In 1885?
A. All except the corner lot that is beyond the Scully
219 house where the Grostein building now is; there was a little old shanty there.
Q. That was in 1873?
A. That was in 1873; that was a little old shanty there which Grostein tore down.
—. As I understand the condition of things of block 24, it is in 1885 you are testifying about?
A. Except the Grostein building.
Q. In 1885 how far out did Scully's building come out?
A. I think Glass's new building was built then, before that. I don't remember when Glass's new building was built.
In 1885 I think Scully's frame building was standing north as far as the Fix frame building, joining it. I believe that there was a restaurant keeper came in there and put an addition beyond the McGrane house, a small addition at the back end. About that time there was a man made some improvements on that house and ran a restaurant there.
The COURT: Doctor, how long have you been in business in that block?
A. Since February, 1874.
Q. Have you been in business all of the time in that block since February, 1874?
220 A. Yes sir.
Q. How does it happen you don't only testify as to the period of 1885?
A. That is when I built my brick.

Q. But you have given some facts prior to 1885?
A. Yes sir.

Mr. Smith asking questions:

I bought out the Kelly drug store in 1874 and the drug store building, together with the store room building and that ran back even to the Squier building, and afterwards I built the building that was there that was recently destroyed by fire, and the building which I built ran out to the line of occupancy and that was the condition prior to 1885.

Q. How far do you remember Whitfield Bros. were there?
A. Back even to our lots.
Q. When do you remember the Whitfield Bros., before or after the True survey?
A. Both before and after.
Q. That was there before the True survey?
A. Yes sir.

Q. Mr. Tweedy asked you if that was — condition in 1885?
221 A. That fence was there prior to 1885.

Thereupon JOHN M. FIX was called, sworn to — the defendants, gave the following testimony and none other, and the following proceedings were had and none other.

I reside in Lewiston; have resided here about thirty years; was formerly in business with Mr. Vollmer; our store was between Third and Fourth street where that new building is now up—close to where Ransom Coburn is doing business. We were in business there I think five or six or seven years, something like that. I think our building was about fifty feet long, as near as I can remember; it came out to the south line of D street as I understood it, and the buildings were generally on that line.

Q. Getting over into block 24, when did you go into this there?
A. About ten or eleven years ago. I bought the George Glass and Conrad Wintsch properties, and part of the buildings which were recently destroyed by fire was on the land at that time; one part of it I built myself—that is, I built an addition.
Q. The building as you bought it, ran back to D street, that line?
222 A. Yes sir. That was the one next to Mr. Scully.

Q. Do you remember the general condition of that block (24) to which Mr. Moxley has referred in the early day, before True's survey?
A. Yes sir, partly.
Q. Remember the Bunker & Squier building.
A. Yes sir.
Q. Remember Dr. Kelly's drug store with the store room behind?
A. No, I do not think I remember the Wesley Mulkey building on the other corner where Parker now is. The Bunker & Squier building extended all over the lot. It was on a line with our building down on the other block, and the buildings that were there were intended to be in a general course throughout, although I do

not think they were on an exact line, as that line was what was recorded as the south line of D street. I do not remember exactly the conversation I had with Mr. Scully when he was building his new building, only I told him he ought to go out to the line we were holding on the building he took off. I told him then that was our property line. I remember when McGrane's occupied lot
6, block 24. I do not remember when their building was
223 built. I do not remember exactly the little fence. I think there was a fence back there, but I am not sure.

I heard this young man from the post office testify concerning the conversation with me. I do not know how that conversation came up. We were standing around the building. I think I had some kind of a conversation with him. Something on the order he got off. I don't remember it exactly. In a general way it was talk. I do not remember about his telling me of his experience in Iowa. I came here in 1875 and the True survey was made in 1874.

Q. The south line of D street to which the Thiessen building is built, the Dent & Butler building and the Lewiston National bank building in block 22, the Thiessen building, the Binnard building and the old harness shop of Ransom Coburn, the new building of John P. Vollmer and the building where Parker's saloon is in block 23, and your proposed new building in block 24, with ro-stein's old building, is the south line you have regarded all ese years as the property line?

A. Yes sir. In erecting my new building I am simply trying to cover the lines we have been holding. I do not think my build-
ing is out quite as far as Doctor Moxley's. There is an
224 angle in Dr. Moxley's building. Yes sir, his north line is north a ways, and we are going directly east and west, taking the east corner instead of the west for our line. I am on a line with his northeast corner instead of with his northwest corner- I stated that before Mr. Scully built I tried to get him to come out to this line. I do not know whether I tried to get him to join and go before the city council and get that settled. I may have mentioned the city council or I proposed to go down there. I did make such a proposition that the people ought to get together on that street and have the thing settled up because it has been so uncertain about these things, one claiming this and another something else, and that ought to be fixed up, I did make such talk as that.

Thereupon, on cross examination by Mr. Tweedy, the witness gave the following testimony and none other.

WITNESS: I was in business with Mr. Vollmer in a building next to the store where Mr. Coburn's harness shop is now. I don't know as I did go to the back door and especially sight down along the line at the north end of the buildings on D street. I suppose
I did. I have been on that street a great many times. I
225 have traveled up and down D street at the back end of those buildings some.

Q. You saw buildings shorter than others?

A. Yes sir.

Q. A good many?
A. Yes sir.
Q. On D street.
A. Yes sir.

On Main street they all came out even, because that was the front street. On the other there were some entrances in the back and it was regarded, to some extent, as the back entrance to those buildings, and that condition existed to some extent I guess at the time True made the survey, some shorter buildings and some longer buildings.

Answering questions by Smith the witness continues:

In these old buildings, each man built his own building separately, and while some of them were shorter, there was a fence to cover the balance of the lot right on the line, and these were on a general line.

Answering questions by the Court:

There was either a building or a fence; yes sir. The fences covered the whole street; there was a jog in there that way.

226 Answering questions by Mr. Smith:

And while some of the buildings set in, there was a fence to show the line of that street, and I am simply claiming out to the fence that we didn't tear down. I was not stopped from building this building out to that fence. I stated I am not trying to take any more land than my old building took. It was a two story building with a great high roof on it, very near as high with the front, very near as high as the Scully building. I have recently sighted north of the Grostein building to see how high that building is. It is nearly as high as the Scully building. It is even with the tops of the windows on the third floor and that was the condition there when Scully built.

Answering questions by Tweedy the witness continues:

Q. You say they had fences on every lot along there?
A. As near as I can remember, yes sir.
Q. But you won't take your oath to it, will you, as a positive fact?
A. Well, I think I will, yes sir.

Q. Was there a fence around the Grostein lot at the time of
227 the True survey?

A. I don't know about that; I am speaking later about that. I wasn't there when the True survey was there. I came after the True survey.

Q. Then you don't want to be understood that from the McGrane property up east, as near as you can remember, the property was all covered by either buildings or fences?
A. To the best of my knowledge-
Q. That is your recollection of it?
The COURT: In 1875 or 1874?

A. 1875, yes sir.

Q. Can you state who had fences along there?

A. Well, there was one on my place, and Thiessen had a fence, and Mr. Vollmer had—well it was a shed he had there between the corner, and between the old Lowenberg building and shed. We had a store in there one lot wide, and we had a shed and used it for a warehouse for shedding things—and it was about the same—well, there was a fence there before that, before we put the shed there. That is in this place where Vollmer and I were in business next to Ransom Coburn. It was the Jimmy Gage place. That is not where Coburn is doing business now. That is Vollmer's building. He had two lots—one of them covered the main store.

228 Then we had another one. The west was covered by a very small building in front and the shed back to the fence. That covered the lot from the Lowenberg building to the store, we were doing business in.

Excused.

Thereupon D. C. WRIGHTER was called, sworn for the defendants, gave the following testimony and none other, and the following proceedings were had and none other.

Name, Daniel C. Wrighter; age forty-one, reside at Lewiston, am civil engineer and surveyor. I identify the book you hand me as one of the papers at my office. It is apparently a record of lots sold by the city of Lewiston, to people dating back to 1874. Looking at this plat of the city introduced in evidence and at this book I have in my hand, I can find reference to this book. The lots and blocks as described in this book refer to this plat. This plat is the one I identified this morning. The numbers are a little bit different on this plat and the plat of the True survey. I can find a record of the city referring to the places bearing these numbers to the blocks. For instance, block 15 here this block 15 is now block 24. Block 16 is now block 23 and block 22 it hap-

229 pens to come the same number 22. (Document handed witness). Among the records of city engineer, I recognize the document you hand me as one of my records. I saw them when we found them the other day.

Thereupon the said document referred to by the witness was offered in evidence.

Mr. TWEEDY: We object to that being admitted in evidence, as evidence showing occupancy or possession by these parties.

The COURT: If you will follow it up with the deed, I will let it go in.

Said paper is admitted in evidence as defendants' exhibit 6-A, to which the plaintiff excepts, a copy of which is as follows:

To the mayor of the city of Lewiston, Idaho Territory, trustee for the inhabitants of said city, under the patent from the United States:

We, J. Lowenberg, B. Lowenberg, H. Lowenberg and A. Lowenberg, under the firm name of Lowenberg Bros., hereby make application to the mayor, trustee for the inhabitants of the said city of Lewiston, for a title in fee to the following land as described in the plat of the city of Lewiston, Idaho Territory, recorded in accordance with section one, of an act to provide for the surveying,
230 platting and disposal of the lands in the city of Lewiston, county of Nez Perces, and Territory of Idaho, passed by the legislature of said territory January 8th, 1873, in accordance with an act of congress of the United States, to-wit:

Lot six (6) in block twenty-three (23), said lot being twenty-five feet by fifty feet, fronting on E street 25 feet and D street 25 feet and on the east side of Third street fifty (50) feet. That we hold the same by actual occupancy, and have a building erected thereon.

LOWENBERG BROS.

TERRITORY OF IDAHO, *County of Nez Perces, ss:*

On this 1st day of July, A. D., 1875, I, Jasper Rand, for and on behalf of its claimants, Lowenberg Bros., do solemnly swear that the statements in the foregoing application to the mayor of the city of Lewiston, Idaho Territory, trustee for the inhabitants of said city, for land described in, and included in the patent for the same to him said trustee, from the general government of the United States of America, are true of my own knowledge, except as to matters therein stated on information and belief and as to those matters I believe them to be true.

JASPER RAND.

231 Subscribed and sworn to this first day of July, A. D., 1875, before me.

D. J. WARNER,
City Recorder.

Endorsed: Application of Lowenberg Bros. for title deed to lot six in block twenty-three (23). Filed July 1st, 1875. No. 8. Henry W. Stainton, Mayor Trustee.

WITNESS: The document you hand me now is Mr. Vollmer's application. This is one of the documents from my office which is in the records and files I have in my charge, and the document referred to by the witness is already in evidence and a copy set out in full in the testimony of Mr. Coburn. I have not measured Charlie Parker's building where the saloon is, but I measured D street.

SMITH: I wish tonight you would make a measurement of that building. I will use you tomorrow.

On cross examination by Mr. TWEEDY, the witness gave the following testimony and none other and the following proceedings were had and none other.

Did Mr. Fix attempt to get a permit from you to go out beyond the True survey?

232 Objected to as incompetent, irrelevant and immaterial, and not cross examination. Objection sustained, plaintiff excepts.

Thereupon GEORGE E. ERB was called, sworn as a witness *to* defendants, gave the following testimony and none other, and the following proceedings were had and none other.

Examined by SMITH:

Am chief deputy clerk of this court. As such I have charge of the court records and files. The documents you hand me are a part of the documents in my possession as such clerk and are the records and files of the clerk's office in this county. The files you hand me are those in the case of Lowenberg Bros. *vs.* Henry W. Stainton, mayor trustee of the city of Lewiston. I have resided here since 1889, sixteen years last February, and I know that part of the city, formerly known as the Crite's alley. I remember where Jim Reid used to have his law office. Down close to the Odd Fellows' hall.

Mr. SMITH: The documents which we have, if the court please, are offered in evidence. I presume the court will reject them under the rulings, to show that Lowenberg Brothers were the owners of the property where Mrs. Ritchie's millinery store now is, and I
233 will complete the offer by offering a deed, recorded at the request of Lowenberg Brothers, August 23rd, 1872, at 3 o'clock p. m., book S. 295-6-7, and filed for record August 19th, A. D., 1872, at 5 o'clock p. m. John Brealey, County Recorder.

This deed offered being a conveyance of the lot just referred to from Rebekah Poland to Bernarr Lowenberg. The documents which the witness has in hands is a complaint and the papers in a suit of Lowenberg Brothers against Henry W. Stainton, mayor, as trustee, to compel him to plat as a part of the lots of the city of Lewiston the piece of property which E. B. True included in Sixth street, to open that alley. This is in connection with the Mrs. Fogarty application.

Mr. TWEEDY: I object for the reason it does not tend to establish the lines of D street; cannot bind the parties to this action or have any effect upon this case.

Objection sustained.

Witness continues: The book you now hand me is evidently an original assessment roll of Nez Perces county, Idaho, of 1868. We have the custody of this after it becomes delinquent. I should judge this book covers 1865-1867 and '68 and for two, I believe, three years prior. Looking at the front of this book there is a plat
234 of the land contiguous to Snake and Clearwater rivers, streets, lots and blocks.

Thereupon, the defendants offer to prove from the records and files that the plat now referred to was prior to the survey of E. B. True and was used by the officials in making the assessment and is part of the record of Nez Perces county, and that the plat as now sought to be introduced corresponds with the number of blocks and the direction and size of the lots of the plat heretofore introduced. The same was ruled out on objection.

Witness continues: The document you now hand me is one I think strictly in charge of the official stenographer, but they are incidentally under the custody of the District Court. It is an exhibit of a case tried in this court in this county. It was never filed as a plat.

SMITH: As identifying the document which I have, it is a certified copy from the commissioner of the general land office introduced in the townsite case referred to, Levi Ankeny against Alonzo Gilman. The particular part which I wish to offer in evidence, as positively identifying this plat is the testimony of Henry O. Adams, showing Lewiston was divided into lots and blocks.
235 and this is a plat of the city.

Said offer was ruled out on objection of the plaintiff.

Mr. TWEEDY: I don't know as I understand the situation with reference to this plat in the back part of this book; it is not in evidence?

The COURT: No, Mr. Erb's statement that there was a plat here is in evidence.

Thereupon D. C. WRIGHTER was called as a witness on behalf of the defendants, gave the following testimony and none other, and the following proceedings were had and none other:

The document you hand me is one of the documents in my possession as city engineer—part of the files of my office (said document properly marked). The document which you now hand me is an instrument that was in my office as city surveyor. Comparing that signature with the signature on the back of these plats, I have seen them a great many times, and it is the signature of Henry W. Stainton.

SMITH: We will offer in evidence the marked application of Lowenberg Bros. for platting land, lot 6 in block 23, one foot wide on Third street, and four feet in width on D street, so the lot will be 26 feet by 50 feet. I submit that with the original application because it is amended.
236

TWEEDY: I object to the introduction of this for the reason that it doesn't tend to prove any of the issues, in this case, or disprove any of the issues, for the further reason that there is an application after the approval of that by the mayor and after the title has passed to the city.

Objection overruled.

Plaintiff excepts to the ruling.

Said document is admitted, marked defendants' exhibit 9 and is as follows:

To the Mayor of the City of Lewiston, Idaho Territory, Trustee for the Inhabitants of Said City Under Patent from the United States:

The undersigned hereby make application to the mayor of the said city of Lewiston, Idaho Territory, trustee for the inhabitants of said city for lands therein, for the survey and platting upon the plat of the said city, the following described land, to-wit: Commencing at the southwest corner of lot six, in block twenty-three, thence westerly on the north line of E street one foot; thence northerly at right angles with said lot 6 fifty (50) feet; thence easterly at right angles with the northerly end of lot 6 twenty-six (26) feet; thence southerly four feet to the northeast corner of
237 said lot six in block 23 and that said land herein described be attached to and made a part of the said lot six. The applicants further state that the said land is covered by their building that they now are, and have for many years been *bona fide* occupants and in the actual possession of said lands and are entitled to a title in fee for the same.

LOWENBERG BROTHERS,
Claimants.

TERRITORY OF IDAHO, *County of Nez Perces, ss:*

Jasper Rand, being duly sworn, for and on behalf of said claimants, says that he is acquainted with the location of said land herein described, and that the statements in the foregoing application in relation thereto are true.

JASPER RAND.

Subscribed and sworn to this 14th day of July, A. D., 1875, before me.

JOHN G. BERRY,
Probate Judge.

Endorsed: Application of Lowenberg Brothers for platting land adjoining lot 6 in block 23, one foot in width on Third street and four feet in width on D street, so as lot 6 will be 26 feet by 50 feet. Filed July 14th, A. D., 1873, under protest. Henry W.
238 Stainton, Mayor Trustee. No. 80.

Witness continues: I have measured the building that stands on lot 6, block 23 where Charlie Parker's saloon is. I measured it this morning. The length of that building on Third street is 50 feet. Its width on D and E streets is 27 feet very nearly. As city engineer I have had occasion to test the accuracy of the survey of E. B. True.

Thereupon the defendants offered to show by the witness that it is impossible for any surveyor or any draftsman to take the field notes of True's survey affecting the city of Lewiston, and take the monu-

ments as he established them with the angles and variations of the blocks, lots and streets, and reproduce the plat of the city; and also to show the property owners along E street have never conformed to the True survey, which offer was denied.

Thereupon GEORGE E. ERB was recalled as a witness for defendants, gave the following testimony and none other, and the following proceedings were had and none other:

WITNESS: I am deputy auditor and recorder of Nez Perces county. This book is one of the records of Nez Perces county. At page 142 I find a deed from Henry W. Stainton, mayor of the city of
239 Lewiston, to John P. Vollmer, affecting lot 4, block 23.

Mr. SMITH: We will offer to supply the record with a certified copy, and offer it in evidence.

Mr. TWEEDY: We have the same objection and exception to each one of these deeds?

The COURT: Yes, there being no objection to furnishing the certified copy later.

Mr. TWEEDY: I want this objection to extend to all of these deeds so I will not have to repeat it.

The COURT: The record is admitted in evidence and a certified copy will be furnished later.

And the said deed to John P. Vollmer is as follows:

Dated December 13th, 1875. Filed for Record December 15th, 1875, at 1 o'clock p. m.

Know all men by these presents, that whereas on the tenth day of April, A. D., one thousand eight hundred and seventy-five, a patent was issued by the United States to me, Henry W. Stainton, mayor of the city of Lewiston, Nez Perces county, Idaho Territory, in trust for the several use and benefit of the inhabitants of the said city according to their respective interests by virtue of an act of Congress of March 3d, 1867, entitled: "An act for the relief of the in-
240 habitants of cities and towns upon the public lands. And whereas, an act of the legislative assembly of the Territory of Idaho, approved January 8th, A. D., 1873, entitled "An act to provide for the survey, platting and disposal of the land in the city of Lewiston, Nez Perces county, Idaho Territory, pursuant to the United States statutes made and provided directs and authorizes me the said mayor of the said city of Lewiston under the provisions and limitations of said act to make and deliver to the *bona fide* occupants of such portions of the said land described in said patent who may be entitled thereto, good and sufficient deeds of conveyance in fee simple according to their respective interests.

In consideration of the sum of two and 60/100 dollars to me in hand paid and received and by virtue of the authority above cited, I the said Henry W. Stainton, as mayor of the said city of Lewiston, have this day, granted, bargained, sold, aliened, remised, released, conveyed and confirmed and by these presents do grant, bargain, sell,

alien, remise, convey and confirm unto John P. Vollmer, his heirs and assigns forever, all of lot (4) four of block No. 23, according to the plats of said city. Lot four in block 23 is described as
241 follows, to-wit: Twenty-six feet in width on E and D streets and fifty feet in length, containing one thousand three hundred feet (1300), together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining:

To have and to hold unto him, the said John P. Vollmer, his heirs and assigns forever.

In witness whereof I, the said Henry W. Stainton, mayor as aforesaid, on this thirteenth day of December, A. D., one thousand eight hundred and seventy-five, hereunto set my hand and seal.

[SEAL.] HENRY W. STAINTON,
Mayor of the City of Lewiston, Nez Perces County, Idaho Territory.

Signed, sealed and delivered in the presence of—
JASPER RAND.
D. J. WARNER.

TERRITORY OF IDAHO, *County of Nez Perces, ss:*

On this thirteenth day of December, A. D., 1875, personally appeared before me, a justice of the peace in and for said county and territory, Henry W. Stainton, personally known to me to be the person who executed the foregoing conveyance and acknowledged
242 that he in his official capacity as mayor of the city of Lewiston, I. T., executed the said conveyance freely and voluntarily and for the uses and purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed my seal this the day and year in this certificate above written.

D. J. WARNER, *J. P.*

Recorded at the request of J. P. Vollmer, December 28th, 1875, at 4 o'clock p. m.

I hereby certify the foregoing instrument of writing to be a true copy of the original now on file in my office for record.

WITNESS: At page 149 of the same book I find a deed from Henry W. Stainton, mayor trustee, to Bernard Lowenberg of lot 6, block 23, with other property.

Document admitted in evidence and is as follows, to-wit:

Dated December 15th, 1875. Filed for Record December 15, 1875, at 2 o'clock p. m.

Know all men by these presents, that whereas on the tenth day of April, A. D., one thousand *and* eight hundred and seventy-five, a patent was duly issued by the United States to me. Henry W. Stainton, mayor of the city of Lewiston, Nez Perces county, Idaho
243 Territory, in trust for the several use and benefit of the inhabitants of the said city, according to their respective inter-

ests, by virtue of the act of Congress of March 3d, 1867, entitled "An act for the relief of the inhabitants of cities and towns upon the public lands." And whereas, an act of the legislative assembly of the Territory of Idaho, approved January 8th, A. D., 1875, entitled: "An act to provide for the survey, platting and disposal of the land in the city of Lewiston, Nez Perces county, Idaho Territory, pursuant to the United States statutes made and provided, directs and authorizes me the said mayor of the said city of Lewiston under the provisions and limitations of said act, to make and deliver to the *bona fide* occupants of such portions of the said land described in said patent, who may be entitled thereto, good and sufficient deeds of conveyance in fee simple according to their respective interests.

In consideration of the sum of three and 23/100 dollars to me in hand paid and received and by virtue of the authority above cited I, the said Henry W. Stainton, as mayor of the said city of Lewiston, have this day granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents do grant, bar-
244 gain, sell, alien, remise, convey and confirm unto Bernard Lowenberg, his heirs and assigns forever, all of lot No. seven of block No. twenty-one and lot No. 6 (6) of block No. 23, according to the plats of said city described as follows, to-wit: Thirty-five feet on the north side of E street, fifty-five feet on line of lot six; sixty feet on the lane, twenty-six feet in width at the north end of lot on line of lot six, containing one thousand six hundred and fifteen feet: Lot six in block twenty-three fronts on E street 26 feet on D street 26 feet and on Third street fifty feet, containing 2550 feet, together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining.

To have and to hold unto him the said Bernard Lowenberg, his heirs and assigns forever.

In witness whereof, I, the said Henry W. Stainton, mayor as aforesaid, on the fifteenth day of December, A. D., One thousand Eight Hundred and seventy-five hereunto set my hand — seal.

[SEAL.] HENRY W. STAINTON,
Mayor of the City of Lewiston, Nez Perces County, Idaho Territory.

245 Signed, sealed and delivered in the presence of
JASPER RAND.
D. J. WARNER.

TERRITORY OF IDAHO, *County of Nez Perces, ss:*

On this Fifteenth (15th) day of December, A. D., 1875, personally appeared before me, a justice of the peace in and for said county and territory, Henry W. Stainton, personally known to me to be the person who executed the foregoing conveyance and acknowledged that he in his official capacity as mayor of the city of Lewiston, I. T., executed the said conveyance freely and voluntarily and for the uses and purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed my seal this, the day and year in this certificate above written.

[SEAL.] D. J. WARNER, *J. P.*

Recorded at the request of B. Lowenberg, January 10th, 1876, at 2 o'clock p. m.

I hereby certify the foregoing instrument of writing to be a true copy of the original now on file in my office for record.

W. P. HUNT,
County Recorder.

246 Thereupon JOHN E. NICKERSON was called, sworn and testified on behalf of the defendants, gave the following testimony and none other, and the following proceedings were had and none other.

Name, John E. Nickerson, age 38, residence Lewiston. Am city clerk. Have been city clerk since July 1, 1903, and the book which I now have is one of the records and files of the city. It is a record of the minutes of council proceedings. The first meeting that is shown in this book is of November 6, 1871, and the minutes read as follows:

Lewiston, Idaho, Nov. 6, 1871.—The common council of the city of Lewiston met pursuant to law, Present, Levi Ankeny, Mayor; Moses Heckster and J. M. Curry, Councilmen; and Daniel McAlfee, City Marshal. The office of City Clerk and Recorder being declared vacant, whereupon — motion of Moses Heckster, seconded by J. M. Curry and carried unanimously Charles G. Kress was appointed City clerk and Recorder to fill the vacancy occasioned by the absence of J. W. Dyer, late clerk and recorder.

WITNESS: The signature at the bottom of this minute is Charles G. Kress, Clerk. On the next page and still on this page, I
247 find another meeting of the city council.

TWEEDY: It may be conceded that you will find in that book a record of such meeting on down to the granting of a patent by the United States to the mayor of Lewiston at that time.

SMITH: With the admission, there was a regularly organized city government long prior to True's survey. I will ask you to turn to the minutes in the book you have for the month of April, 1874.

WITESS: I have it.

Thereupon counsel agreed that the matter of the entry of the townsite was regularly taken up by the citizens and funds were donated by the citizens to make the entry.

WITNESS: The minutes of the meeting of July 20, 1874, as found on page 24 of the record read as follows:

Present, H. W. Stainton, Mayor; H. Squier, J. P. Vollmer, councilmen; D. McAlfee, marshal; J. G. Vincent, Clerk.

SMITH: This minute provides for the employment of E. B. True as surveyor. His bid was accepted and they employed him and the next thing was to establish an initial point, which is a motion of Mr. Vollmer.

248 Moved by Vollmer and seconded by Squier that the initial line of survey of the city be the front of the buildings on the west side of First street. Carried.

WITNESS: That minute is signed by Joseph K. Vincent, clerk.

TWEEDY: It seems to me it is a good deal like dealing in traditions. Some have it one way and the other the other way.

COURT: You have proved they were all on the line there.

SMITH: Here is the application on which the deed is given.

COURT: You have already proven by Mr. Coburn that that building was out on a line, about on his line. That the old building was out about on a line with his building. I think that is all that would be necessary.

Thereupon the testimony closed, all witness- being sworn as witnesses.

The plaintiff now moves the court for a new trial in the above entitled actions and as grounds therefor and errors of the court upon which the plaintiff relies in this court and the appellate courts and all courts, the Supreme Court of the state of Idaho, for a new
249 trial in the above entitled action, enumerates and specifies the following, to-wit: and relies upon each error and ground herein assigned, to-wit:

First.

The Court erred in overruling the objection to the following question:

Q. You don't know of your own knowledge, Mr. Scully, that any part of these lots covered by these old frame buildings of Mr. Fix and Mr. Moxley and Mr. Squier and Mr. Grostein was ever used as a street, was it?

Objected to as incompetent, irrelevant and immaterial.

Second.

The Court erred in overruling the plaintiff's objection to the following question:

You don't know of your own knowledge, Mr. Scully, that any part of the land covered by these old frame buildings of Mr. Fix's and Mr. Moxley's and Mr. Squier's and Mr. Grostein's was ever used as a street, was it?

Objected to as incompetent, irrelevant and immaterial.

Third.

The Court erred in overruling the following objection to
250 the defendants proving by the witness Briggs, the occupation of a portion of D street by them, to-wit:

Mr. TWEEDY: I object to all this cross-examination for the reason that it is not proper cross-examination, and for the further reason that the red line is to show the obstruction as the defendants propose to make it at the present time, and for the further reason that occupancy does not give them any title to that part of D street as shown by the survey of E. B. True.

Fourth.

The Court erred in overruling plaintiff's objection as follows:

TWEEDY: I object as incompetent, irrelevant and immaterial; that the True survey shows the boundaries of that street and the fact that the buildings are on there is immaterial, and for the further reason that buildings being on these blocks east of this block is immaterial and don't make any difference in the case, which is an objection to the introduction of True's field notes of blocks 22 and 23, and the proposition of the defendants to prove that True cut off something from buildings erected at the times subsequent to the survey and from some standing at the time of the said survey by his
251 survey of D street, in blocks 22 and 23.

Fifth.

The court erred in overruling the objection of plaintiff to the admission of Wesley Mulkey's application for lot 1 in block 24, which objection is as follows:

TWEEDY: I object to this application as being any evidence whatever of the fact of extending the lines of this lot beyond the True survey. I object to all these applications for that reason, and for the further reason that the city or mayor, could not make any deed to property beyond the True survey to anybody; that the title had already passed and vested in the city of Lewiston, by reason of the survey and by reason of the platting.

Sixth.

The court erred in overruling the objection of the plaintiff to the admission in evidence of the plat in C. P. Coburn's testimony, which objection is as follows:

TWEEDY: I object, your honor.

It is a copy and there is no showing as to where the original is. For the further reason it is hearsay evidence, and it is not admissable in this case at all.

252 Seventh.

The court erred in overruling the plaintiff's objection to the admission in evidence of John P. Vollmer's application for lot 4 in block 23 which is as follows:

TWEEDY: Objected to as incompetent, irrelevant and immaterial, and these applications cannot change the rights of the parties, or give the mayor any power to convey land otherwise than according to the True survey, to anybody, and that the only remedy which the occupants had was an action to compel the True survey to be corrected, if it was not according to law, as required by law; that they got their title to the property as surveyed and platted by True and in no other way, and they got no title whatever by reason of occupancy and the city got title by reason of platting and the description of the streets.

Eighth.

The court erred in overruling the plaintiff's objection to the admission in evidence of the application of Lowenberg Bros. for lot 6, block 23, which objection is as follows:

Mr. TWEEDY: We object to that being admitted in evidence as evidence showing occupancy or possession by these parties.

253

Ninth.

The court erred in overruling the plaintiff's objection to the admission in evidence of the application of Lowenberg Bros. to have land added to lot 6, block 23, which objection is as follows:

TWEEDY: I object to the introduction of this for the reason that it doesn't tend to prove any of the issues in this case, or disprove any of the issues, for the further reason that there is an application after the approval of that by the mayor and after the title had passed to the city.

Tenth.

The Court erre*r* in overruling the plaintiff's objection to the admission of the deeds to John P. Vollmer for lot 4, block 23 and to B. Lowenberg for lot 6, block 23.

Eleventh.

The Court erred in his finding of fact No. 2 as to the occupancy of lot No. 2 in block 24. And in so far as the said finding may tend to establish or find that Louise Squier is the owner by mesne conveyances of any part of D street, it is contrary to the evidence, the facts and there is no evidence to support it.

Twelfth.

The Court erred in his finding No. 3 as to the time of, oc-
254 cupancy and extent of occupancy by M. A. Kelly and John Q. Moxley and as to lot 3 block 24 being 25 by 50, and that it to the said size was occupied from 1871 to the time of the trial, for there is no evidence of the said occupancy especially before John Q. Moxley constructed the building burned down, and John Q. Moxley applied for and received a deed to lot 3, block 24, and his deed does not cover any part of D street.

Thirteenth.

The Court erred in his 4th finding of fact as to the time of occupancy, its extent, etc., of lots 4 and 5, block 24 and as to John M. Fix and his predecessors in interest occupying any part of D street, for there is no evidence and the evidence is insufficient to sustain the said finding as to these matters but as to these matters the finding is against the evidence, absolutely. The finding is immaterial.

Fourteenth.

Finding five as to the occupation and possession of the defendants, and especially, John M. Fix and John Q. Moxley, its length of time, its extent, and as to exercising acts of ownership for time specified, as to city making no claims, as to occupancy and claims of
255 the plaintiff, and as to the predecessors in interest of the parties to this action, their occupation, its extent, etc., as to maintaining and claiming property rights to the south line of D street as established by user, is against the evidence, is not sustained by sufficient evidence, and it is immaterial.

Fifteenth.

There is no evidence and nothing in this record to support finding No. 7; it is without any evidence to support it; it is error.

Sixteenth.

That the 9th finding is immaterial; that there is not sufficient evidence to support the finding that the predecessors of John M. Fix or himself were in possession at the time of the survey or at any other time of any part of that land platted and surveyed by True as D street, and there is not sufficient evidence to support the finding that no part of the land now occupied by Fix and Moxley was ever used as a street.

Seventeenth.

That finding 10 is against the evidence; the evidence is insufficient to support the finding especially that part of it finding that the south line of D street as surveyed by True did not con-
256 form to the lines of user or to the actual side of the lots and as to blocks 22 and 23, it is immaterial; the whole finding is immaterial; the court erred in making this finding especially as to the survey not conforming to the lines of user of D street and the occupancy of lots 4 and 5 or 3 or 2 of block 24, and that part of the finding as to the size of block 24 and not being able to make the block lines close is absolutely immaterial.

Eighteenth.

That finding 11 is immaterial and the Court erred in finding it for this reason; that that part of it referring to blocks 23 and the occupancy is prejudicial to the plaintiff; that the plaintiff was claiming no relief against any one except the defendants; that there was and could be no issue as between him and any property owners in blocks 23 and 22 and the property owners in block 24 other than the owners of lots 5, 4, 3, 2, and the plaintiff was not required to offer evidence as to the property rights of any other persons than of himself and defendants; that that part of the finding as to occupancy as to line of street in and along blocks 22, 23 and 24 is against the evidence and is not supported by sufficient evidence,

and there is no evidence that the city of Lewiston has never
257 claimed D street to be extensive with the lines of the True survey, but the evidence of Mr. Briggs, an ex-city engineer and that of the present city engineer shows conclusively that the city does claim D street north of block 24 to be co-extensive with the lines as established by the True survey. The evidence is insufficient to support the finding that True did not correctly ascertain the true line of the south side of D street as used by the inhabitants of Lewiston, and the finding is immaterial and against the law and the evidence. There is not sufficient evidence to support the finding that the True survey cuts off approximately four feet from the lots south of the line of user of D street.

Nineteenth.

Finding of fact 12 is against the law and the evidence. There is no admissable evidence to establish it. The descriptions in the deeds do not justify the conclusion that the mayor trustee conveyed anything other than the lot, but the facts that certain lots are conveyed which are described so and so only indicate a mistake in the description. The dealings of John P. Vollmer, of Wesley Mulkey, of Lowenbergs and persons other than the owners of the lots in question in this action, with the mayor-trustee, do not concern
258 this plaintiff, such dealings neither diminishes the rights of the plaintiff and do not add to the rights of the defendants, and should not have been considered in this action, and their consideration has been prejudicial to the plaintiff. It is immaterial so far as this plaintiff is concerned if the mayor trustee had conveyed twenty feet of the street to parties in block 23 or block 22, for he has no action here against any one in blocks 22 and 23. And the property rights of such persons are not involved in so far as the justice of the adjudication between the plaintiff and defendants is concerned. The same rules of law applied between the parties to this action might be applied to the parties to other actions, but that is true as to every property right, and the courts do not deny a property right to one man because the rule of law which secures the right may apply in some other action involving the same facts.

Twentieth.

The 13th finding of fact as to amendment of the plat by red lines is totally unsupported by the evidence, and as to the red lines and as to what they mean there can be nothing but speculation. The testimony of Briggs casts suspicion upon them, The field
259 notes do not explain them. There is no field notes of block 24 or of the lots therein that places the south line of D street one inch north of the north end of plaintiff's building and because of the red lines the surveyors have not been able to ascertain any other south line of D street than the one at the north end of plaintiff's building, and there is no evidence that the defendants' description in their deeds extends one inch beyond the south line of D street at the north end of plaintiff's building, and there is noth-

ing in the evidence to justify the finding that a deed to any of the defendants by its description covers the "claimed four feet north" of the south line of D street as ascertained by E. B. True. That to John Q. Moxley does not; that to Hazen Squier does not; that to James Kearney, or to George Class or to Conrad Wintsch does not—does not cover or convey any ground north of the south line of D street, ascertained by E. B. True. There is no evidence that the city of Lewiston has never claimed all of D street according to the True survey; that it has acquiesced in encroachments upon its streets in blocks 22, 23 or 24, but the evidence establishes that the defendants in disregard of the claims of the city and in defiance of
260 the city have erected their new buildings upon D street. There is not sufficient evidence to support finding 13 as to blocks 22 and 23; such portion is against the evidence. And there is no evidence to support that part of finding 13 which says that approximately four feet north of the south line of D street is a part and parcel of lots 2, 3, 4, 5, block 24; this is absolutely against the evidence; there is no evidence to support it whatever, and there is no evidence in the record to justify such finding, that said approximate four feet is a part of lots 2, 3, 4, 5, of block 24.

Twenty-first.

Finding 14 is immaterial. The evidence is that their new buildings are out into the street further than the old buildings. There is no evidence that the city of Lewiston has given its consent to the occupation of its street by the defendants or that it has acquiesced in such occupancy, or in their claims, but the evidence establishes that the city has ascertained its claims to the entire street by two surveys, one by its engineer, Briggs, and the other by Wrighter, its present engineer. The defendants were given the same curb line as that of plaintiff and would have been given the same property line but did not seem to want it.

261 Twenty-second.

Finding 15 is immaterial. It is against the evidence and can give the defendants no rights to any part of D street.

Twenty-third

Finding 17 is against the evidence. The plaintiff moved his building in because the officer of the city whose duty it was gave him the property line, and he simply recognized the claims of the city made by its officer, and did not attempt to acquire property by usurpation and wrong, and the city by the survey of block 24 for the plaintiff through its proper officer claimed the street line to extend south to the north end of the plaintiff's building. There is not evidence sufficient to establish that the north end of plaintiff's building is approximately four feet south of the line of D street as established by user, and there is no evidence in this record that the plaintiff had a legal right to go one inch further north with his brick building on lot 6, block 24.

Twenty-fourth.

The 18th finding is against the evidence; there is not sufficient evidence to support it; it is based upon the idea that the building of John M. Fix is not an obstruction of the street; that that of
262 John Q. Moxley is not an obstruction of the street; that that of Louise Squier is not an obstruction of the street, and that the plaintiff's building is south of the south line of D street; that plaintiff has a right to extend his building north to be even with that of defendants; this is all error.

Twenty-fifth.

Finding 19 is misleading. It is based upon the declaration of the plaintiff of the cost of carrying his building north to be even with that of the defendants. The plaintiff has no more right to obstruct D street and to maintain a public nuisance than have the defendants, and, consequently, his damages cannot be measured in any such way. The evidence conclusively establishes special damages to the plaintiff by the defendants.

Twenty-sixth.

The defendants are contributing to the same nuisance and join in maintaining it, and therefore finding 14 is against the evidence; and is error.

Twenty-seventh.

The findings of fact do not authorize the conclusions of law; are not sufficient facts found to support the conclusions of law. The findings of fact are against the law; are against the evidence; there is not evidence sufficient to support them. The conclusions
263 of law are against the evidence and against the law. The defendants have established neither a legal or equitable title to any part of D street north of the south line thereof, ascertained by E. B. True and the mayor trustee; the defendants after an expiration of 30 years can not impeach the correctness of the official survey and by finding it did not conform to the line of user, move the property line north; especially are the defendants estopped because before seeking a correction of the said survey they permitted the plaintiff to invest thousands of dollars upon the faith of the official survey and platting and they, themselves, accepted deeds which merely conveys to each of them the land in the lots south of the south line of D street as officially established. The decision is against the evidence, is against and contrary to the law, is not supported by sufficient evidence.

Notice of Motion for New Trial, or Application.

In the District Court of the Second Judicial District of the State of Idaho, in and for Nez Perces County.

MATTHEW SCULLY, Plaintiff,
vs.
JOHN M. FIX, JOHN Q. MOXLEY and LOUISE SQUIER, Defendants

264 You and each of you, defendants in the above entitled action, and I. N. Smith, your attorney, are notified that the plaintiff intends to move for a new trial in the above entitled action upon affidavits, records and files in the said action, the minutes of the court, a bill of exceptions and a statement of the case, and the grounds upon which the application for a new trial, or motion therefor, will be made are as follows, to-wit:

First.

Insufficiency of the evidence to justify the decision.

Second.

That the decision is against law.

Third.

Error of and in law, occurring at the trial, and excepted to by the plaintiff.

BEN F. TWEEDY,
Attorney for Plaintiff.

Service of the within by copy accepted this 13th day of December, 1905.

I. N. SMITH,
Attorney for Defendants.

Filed this 13th day of December, 1905.

J. R. LYDON, *Clerk,*
By GEO. E. ERB, *Deputy.*

265 Order.

In the District Court of the Second Judicial District of the State of Idaho, in and for Nez Perces County.

MATTHEW SCULLY, Plaintiff,
vs.
JOHN M. FIX, JOHN Q. MOXLEY and LOUISE SQUIER, Defendants.

It is hereby ordered and the plaintiff is hereby given sixty days from the date of the filing of the judgment herein within which to

prepare and serve a bill of exceptions or statement of facts in the above entitled action, and by virtue of this order the time allowed by statute is extended fifty days, making sixty days, for the preparation and filing and service of a statement of facts.

Dated this 13th day of December, 1905.

E. C. STEELE, *Judge.*

I hereby consent to the foregoing order being made by the judge without notice per stipulation.

I. N. SMITH,
Attorney for Defendants.

The foregoing Statement of the Case and Bill of Exceptions is hereby settled and allowed as true, complete and correct.

EDGAR C. STEELE, *Judge.*

This August 4th, 1906.

266 Whereas the plaintiff has appealed to the Supreme Court from the decree in the above entitled action, rendered and entered and recorded in judgment book G of the records of the above entitled court at page 255 on the 13th of December, 1905, and filed on said 13th of December in the office of the clerk of the above entitled court, and also described in the notice of appeal in the above entitled action.

And whereas, the plaintiff has also appealed to the said Supreme Court from the order, overruling the motion for a new trial in the above entitled action, made and rendered by the judge of the above entitled court on the 27th day of November, 1906, and filed in the clerk's office of the said court on the said 13th day of November, 1906, and described in the notice of appeal in the above entitled action.

Now therefore, Matthew Scully, the appellant, and we, Edward C. Smith and D. O. Powell, sureties for the plaintiff, are bound and held to the defendants and to each of them in the sum of Three Hundred Dollars, and undertake and agree that the plaintiff, the appellant, will pay all damages and costs which may be awarded against him on the appeal from the said decree, above de-
267 scribed, or on a dismissal of the said appeal from the said decree, and we further undertake and agree that the appellant will pay all damages and costs which may be awarded against him on the appeal from the said order overruling the motion for a new trial, above described, or on a dismissal of the said appeal from the said order overruling the said motion for a new trial, not exceeding three hundred dollars ($300.00), and this undertaking is executed to the defendants and to each of them.

MATTHEW SCULLY.
EDWARD C. SMITH.
D. O. POWELL.

STATE OF IDAHO, *County of Nez Perces, ss:*

The undersigned, each being duly sworn, upon his oath says for himself, and not one for the other, that he is a resident, householder and freeholder of Nez Perces county, State of Idaho, that he is worth in property over and above all exemptions and liabilities more than one thousand dollars.

EDWARD C. SMITH.
D. O. POWELL.

Subscribed and sworn to before me this 7th day of December, 1906.

SAMUEL O. TANNAHILL,
[SEAL.] *Notary Public.*

268 Filed this 8th day of December, 1906.

J. R. LYDON, *Clerk,*
By GEO. E. ERB, *Deputy.*

Notice of Appeal.

To I. N. Smith, John M. Fix, John Q. Moxley and Louise Squier:

You and each of you are hereby notified that the plaintiff appeals to the Supreme Court of the State of Idaho from the judgment or decree, rendered in the above entitled cause and court, entered and recorded on the 13th day of December, 1905 in judgment book G of the records of the above entitled court and which said decree was filed on the said 13th day of December, 1905, and the plaintiff also notifies you that he appeals to the said Supreme Court from the order overruling the motion for a new trial in the above entitled action, filed on the 27th day of November, 1906, in the clerk's office of the above entitled court, and which said order was rendered or made on the 27th day of November, 1906, by the judge of the above entitled court, and from the whole and every part of the said decree and order.

BEN F. TWEEDY,
Attorney for Plaintiff.

269 & 270 Service by copy of the foregoing notice admitted on this 8th day of December, 1906.

I. N. SMITH,
Attorney for the Defendants.

Filed this 8th day of December, 1906.

J. R. LYDON, *Clerk,*
By GEO. E. ERB, *Deputy.*

Stipulation of Attorneys.

We, the undersigned, attorneys respectively for the appellant and respondents hereby stipulate and certify that the foregoing transcript is a correct transcript of the Complaint, (amended) the answer, the

findings of fact, the conclusions of law, the decree, the statement and of all other matters of which it purports to be a transcript and of all matters set forth therein and is a true and correct transcript of all such matters as it contains.

BEN F. TWEEDY,
Attorney for the Appellant.
I. N. SMITH,
Attorney for the Respondents.

271 *Record Entries.*

LEWISTON, IDAHO, *March* 20, 1907.

SUPREME COURT, *State of Idaho, ss:*

Court met pursuant to adjournment.

Present: Hon. James F. Ailshie, Chief Justice; Hon. Isaac N. Sullivan Justice.

And the officers of the court, when the following proceedings were had (among others) to-wit:

No. 1284.

MATHEW SCULLY, Appellant,
v.
LOUISE SQUIER ET AL., Respondents.

Set for hearing M'ch 26.

LEWISTON, IDAHO, *M'ch* 26, 1907.

(After Title of Court and Cause.)

This cause having been heretofore set for hearing, now on this day the same was called, and Ben F. Tweedy appeared as counsel for the appellant, and I. N. Smith for the respondents. After argument the cause was submitted and by the court taken under advisement.

BOISE, IDAHO, *May* 18, 1907.

(After Title of Court and Cause.)

This cause having been heretofore heard, submitted and taken under advisement by the court, and the court having fully considered the same, now on this day the cause was again called, and the decision of the court is delivered by Justice Sullivan, to the effect that the judgment of the district court of the second judicial district in and for the County of Nez Perces in the above entitled cause be and the same hereby is affirmed. Costs are awarded to respondents.

272 *Opinion of the Court.*

In the Supreme Court of the State of Idaho, March Term, 1907.

Filed May 18, 1907. I. W. Hart, Clerk.

MATTHEW SCULLY, Appellant,
vs.
LOUISE SQUIER ET AL., Respondents.

Encroachments on Street—Injunction—Public Nuisance—Damages to Public and Private Rights—Abatement of Nuisance—Townsite on Public Domain—Entry of—Duty of Mayor—Platting Town-site—Rights of Occupants—Rights of General Public in Unoccupied Lots and Streets—Duties and Powers of Mayor and Surveyor—Trust Imposed.

1. The City of Lewiston was located on the public domain of the United States and under the provisions of Section 2387 of the Revised Statutes of the United States, was entered by the Mayor in trust for the several use and benefit of the occupants thereof according to their respective interests. Said section of the statute provides that the execution of such trust as to the disposal of the lots in such town and the proceeds of the sale thereof must be conducted under such regulations as may be prescribed by the legislative authority of the Territory.
2. In compliance with the provisions of said section, the Territorial Legislature passed an act entitled: "An Act to Provide for the Survey, Platting and Disposal of the Land in the City of Lewiston, Nez Perces County, Idaho, Pursuant to the United
273 States Statutes Made and Provided," which act was approved January 8, 1873. Session Laws 1872-3, p. 16.
3. Under the provisions of said act, a surveyor was employed to survey and plat the lands in said town, and was directed by said act to so arrange and adjust the plat as to conform to the conditions of the improvements and occupation of the lots, and the Mayor was thereafter directed to make and deliver to the *bona fide* occupants of said lands good and sufficient deeds of conveyance in fee simple and the title to the lots claimed by them according to their respective interests under the provisions of said law.
4. The said plat cut off from the northerly ends of the lots in Block 24 about four feet and included the part cut off in D street. At the time said plat was made, said lots, for their entire length, were covered by improvements and possessed and occupied.
5. Said surveyor had no authority or right to cut off a portion of said lots and include it in a street.

6. The rules and regulations made by the Legislature did not enlarge or diminish the rights of the occupants of the lots, as the rights of the occupants accrued at the time of the entry of the town-site and could not be defeated by the surveyor.
7. The interests which the occupants possessed previous to the entry, either in the land occupied by them or in the rights of way over adjoining streets and alleys, were secured by such entry.
8. Under the provisions of said Section 2387, R. S., the execution of the trust imposed on the Mayor as to the disposal of the lots was conducted under the regulations established by the Legislature. The word "disposal" as used in that section must be construed to mean "distribution" when applied to the lots that were actually occupied and possessed, for under said section such lots were already disposed of; that is, they became the property of the occupants and the occupant of a
274 town lot at the time of the entry of a town-site is its real owner.
9. The trust imposed on the Mayor of an incorporated town is for the benefit of the inhabitants, first as individuals, and after that, collectively, as a community, and the title to the occupied lots becomes vested in the trustee for the benefit of the occupants severally at the time such entry is made, and neither the surveyor nor the Mayor can deprive them of that title.
10. That the surveyor cannot make a paper street in such town and deprive the actual occupants of vested rights, as the only authority the surveyor had was to plat the town in conformity to the use and occupancy of the lots and blocks.
11. The surveyor had no authority to establish streets through and over buildings, nor to cut off any portion or parts of buildings for street purposes.
12. The Mayor or surveyor had no authority to change the beneficiaries under such trust.

(Syllabus by the Court.)

Appeal from the District Court of Nez Perces County; Honorable Edgar C. Steele, Judge.

Action for mandatory injunction and abatement of a public nuisance, alleged to damage the public as well as private rights. Judgment for the defendants. Affirmed.

Ben F. Tweedy for appellant.

I. N. Smith for respondents.

SULLIVAN, *J.*:

This is an action to prevent alleged encroachments on D Street in the City of Lewiston. The appellant as plaintiff brought this action against the respondents, alleging that they were encroaching upon said D Street, and charging them with having taken for their private use approximately four feet off the South side of said street and of

extending their building over and upon said four feet of land wrongfully.

275 The nature of this action is a suit in equity to abate a nuisance alleged to be a public nuisance, damaging to the public as well as to the plaintiff's private rights, and praying that the same be abated and removed, and that an injunction be issued restraining and prohibiting defendants and each of them from encroaching upon said street and for a mandatory injunction against the defendants, and to restore said street to its width as claimed to have been established by the official survey of E. B. True, to wit: eighty feet.

The defendants deny any encroachment upon said street and allege affirmatively the incorporation of the city of Lewiston, surveying and platting of the city long prior to the said True survey; that according to the said original plat and survey, the lots in question were fifty feet in length north and south, except where they widened at the bend in E street; (said E Street is also called Main Street and Montgomery Street) that about the year 1874, and long after the rights of the defendants and their predecessors were vested to the premises in controversy, the town-site of Lewiston was entered by the Mayor, Henry W. Stainton, under the Federal Town-site Act; that the defendants and their predecessors in interest were, long prior to 1874, in the actual occupancy, the use and enjoyment of the premises in controversy, which they were enjoying at the time of the commencement of this suit, on which premises they are now attempting to erect the three-story brick buildings referred to in the complaint; that a patent was issued by the United States to the Mayor as Trustee, and thereafter the official survey was made; that said survey was ordered under the Federal and Territorial laws; that the declaratory statement therefor was No. 39 and was made in the United States Land Office at Lewiston, November 21st, 1871, by Levi Ankeny in trust for the inhabitants of the city of Lewiston, claiming settlement in 1861; that cash entry was made June

276 6, 1874, therefor by said Henry W. Stainton in trust; that said True was employed to make the survey and was commanded as follows:

"To so adjust the said plat as to conform to the condition of the improvements of and occupation of the lands affected thereby, and the Mayor-Trustee was authorized, empowered and required to make and deliver to the *bona fide* occupants of such land described in the patent, good and sufficient deeds in fee simple, according to their respective interests, and for that purpose was authorized to carry the act into effect;"

that in making said survey, more especially the survey of the South line of said D Street, the said True did not pay regard to or attention to the several use and uses of the land as the same was then occupied by the inhabitants of the City of Lewiston, and more especially did not pay any attention to the quantity of land then used and occupied by the defendants and their predecessors in interest, and that said True did not conform said D Street as it was known and used prior to said survey, nor did he pay due or any regard to the actual

use, occupancy and improvements of the said lots; that the South line of said D Street, as surveyed and delineated by said True, cut several feet off the North end of the lots of the various inhabitants of Lewiston, which lots had a frontage on D Street, and so cut off the lots in controversy owned by these defendants and their predecessors; that said street as surveyed by said True crossed and interfered with buildings then standing on the same, and attempted to divest certain vested rights; that said True did not conform D Street to the use of lands nor did he make D Street as marked on his map or plat, conform to or coincide with the actual South line thereof as the same had been and then was used and treated as a public street; that thereafter and after the approval of the said True survey, such steps were taken that in many instances the plat and survey
277 were corrected and changed, and that notwithstanding the erroneous work of said True, the various citizens still continued in the actual use and occupancy of their said lands, and the predecessors of defendants did the same as to the lots involved in this case and which are owned and possessed by them, and that such claim was by occupancy, buildings and improvements, continued from the first occupancy, thence hitherto, and that the land involved, being about four feet on the North end of said lots, never at any time, nor at all, was used or occupied as a street but was used and occupied by defendants and their predecessors; that after True had made his plat, it was amended, and the defendants aver that the correct South line thereof is now and was by such amendment shown in red ink and that the red ink line conformed to the true South line and to the several uses and occupancy of the lands involved; that respondent Moxley owned lot 3 in said Block 24, having an area of 1250 sq. ft., both prior to and after said True survey, but that said True gave it only 1173 sq. ft.; that Lot 2 in said block as shown by said True survey contained but 1131 sq. ft., whereas long prior to the said survey and at the time thereof and since, the said lot has in truth and in fact contained 1250 sq. ft.; that the difference between 1250 sq. ft. and 1131 sq. ft. is the strip of approximately four feet wide by twenty-five feet in length which appellant seeks to enjoin the respondent Squier from holding; that such lot as claimed by the said Squier has been actually covered by a building for more than thirty-five years last past and was so occupied by said building long prior to the survey of True; that respondent Moxley obtained title to Lot 3, said block, by direct deed from Henry W. Stainton, Mayor-Trustee, and that the plat of the True survey and the size of this lot as stated by him were amended prior to the recordation of said plat and that True's survey gave said lot only 1136 sq. ft. but the same with an amendment was deeded to said Moxley by said Mayor-Trustee and the strip involved
278 herein is the amendment which said Mayor deeded to Moxley.

The answer then alleges the rights of respondent Fix and avers that his right through predecessors antedates said True survey and that the land claimed by him in addition to that specified in True's survey never was a street or highway, but that said strip was long prior to said survey in the actual, visible, exclusive and

notorious possession of said defendant and his predecessors in interest and never constituted a part of D street; that that state of facts existed at the time said True made his survey and that the appellant when erecting his building did not cover the ground theretofore occupied by his old building, nor by the predecessors in interest of said Scully; that the Grostein building situated on the lot immediately west of the Scully lot was erected seventeen years ago and that said building extends far out beyond Scully's building and was built bordering on the South line of D Street then given to said Grostein by city officers; that said Scully placed his building entirely off of and away from the South line of said D street as it then existed; that the field notes and plat of Block 24 as made by said True did not correspond and that the same are incorrect, which errors interfered with vested property rights.

The answer then alleges that said respondents are attempting to use only the same ground that they and their predecessors have always used; that the premises of each of the respondents extends to the South line of D Street as actually used.

From the foregoing statement, the real issue in the case is very clearly presented. The appellant claims that the defendants have encroached upon and erected their buildings about four feet out on and into said street, while the respondents contend that they have not done so but that their buildings only extend northward to the line which has been occupied and on which buildings have been erected for more than thirty years. The entire contro-
279 versy arises over the correctness of the said True survey and his field notes thereof.

After the trial of the case, the court made quite elaborate findings of fact and deduced therefrom conclusions of law to the effect that the case made on behalf of the appellant was devoid of equity and that he was without any standing in a court of equity; that he has no such interest as would permit him to maintain this action and that the defendants were entitled to judgment and decree in their favor, and judgment was entered accordingly, dismissing the action. This appeal is from the judgment and the order denying a new trial.

In deciding this case, it becomes necessary to recur to a few of the historical facts connected with the location and settlement of the City of Lewiston. It was first settled in the year 1861, upon what was then a part of the Nez Perces Reservation. At that time the territory now included in the State of Idaho was a part of the territories of Washington, Nebraska and Dakota. Nez Perces County, in which the City of Lewiston is located, was organized under an act of the Legislature of Washington Territory on December 20th, 1861. The Territory of Idaho was organized under an act of Congress approved March 3rd, 1863, and its first territorial legislature convened on the 7th of December, 1863, was adjourned on the 4th day of February, 1864, which session was held at the City of Lewiston. At that session of the legislature, by an act approved February 4th, 1864, the boundaries of Nez Perces County were changed and that county reorganized. (1 Sess. Laws, p. 628) Lewiston at

that time was a distributing point for the various mining camps to the North-East, East and South-East. The City of Lewiston was incorporated under the laws of Washington Territory by an act approved January 15th, 1863, and was re-incorporated by an act of the Legislature of Idaho in 1866. (Session Laws 1866, p. 87, Fourth Session).

The first section of that act defines the boundaries of said city and recites that the territory incorporated "constitute in square
280 form, as near as practicable, according to government survey, one square mile, intended to include the square mile of land stipulated for in favor of said town in the treaty between the United States and the Nez Perces tribe of Indians now pending, is hereby organized into a municipal corporation under the name of 'The City of Lewiston.'" It would appear from this that a treaty was then pending between the United States and the Nez Perces tribe of Indians for that tract of land on which the City of Lewiston stood, to the extent of one square mile.

Levi Ankeny was Mayor of the City of Lewiston in 1871, and on November 21st of that year, filed his declaratory statement No. 39 in the United States Land Office at Lewiston, proposing to enter the lands included within the borders of said incorporation, in trust for the inhabitants of the city of Lewiston, claiming settlement in 1861. Cash entry was made for said lands on June 6th, 1874, by Henry W. Stainton, Mayor, in trust for the inhabitants of said city.

This entry was made under the provisions of Section 2387 of the Revised Statutes of the United States, which section is as follows:

"(Entry of town authorities in trust for occupants.) Whenever any portion of the public lands have been or may be settled upon and occupied as a town-site, not subject to entry under the agricultural pre-emption laws, it is lawful, in case such town be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judge of the county court for the county in which such town is situated, to enter at the proper land-office, and at the minimum price, the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as may be
281 prescribed by the legislative authority of the State or Territory in which the same may be situated." The trust provided for by this section is dual in its nature. It exists for the benefit of the occupants as individuals, and also collectively as a community. The title to occupants of lots vested in the Mayor-Trustee for their benefit severally when the entry was made. The title to lots to which no valid claims are held by individuals is taken in trust by the trustee for the occupants of the town-site collectively. See notes to said Section 2387. Vol. 6, Fed. Stat. Ann., p. 343. Under the provisions of said Section, the execution of the trust created, as to the disposal of the lots in such town, must be con-

ducted under such regulations as may be prescribed by the legislature of the state wherein such town is located.

The Legislature of the Territory by an act approved January 8, 1873, (7 Sess. Laws, p. 16) provided for the survey, platting and disposal of the land in the city of Lewiston pursuant to the United States Statutes in regard to such matters. Said act provides that the Mayor-Trustee shall cause to be made and filed in his office by a competent person a plat of the land within said city, divided into blocks and lots, and "to make and deliver to the *bona fide* occupants of such portions of said lands described in said patent from the Government of the United States who may be entitled thereto, good and sufficient deeds of conveyance in fee simple according to their respective rights."

Under the provisions of said Laws, one E. B. True was employed to survey and plat the lands in said town and was commanded to adjust said plat so as to conform to the conditions of the improvements and the use and occupation of such lands by the settler, and the Mayor was required to make and deliver to the *bona fide* occupants of such lands good and sufficient deeds of conveyance in fee simple according to their respective interests, under the provisions of said law.

282 It appears from the evidence in the case that said True made a plat of said town including Block 24, in which block are the lots involved in this case, so as to make the lots about 46 feet long, north and south, when as a matter of fact, most, if not all, of the lots in that block were fifty feet long, north and south, as indicated by the buildings and other improvements thereon. The question is fairly presented as to whether said True had any authority whatever to make said plat so as to interfere with and cut off a part of the buildings and improvements of the occupants of such lots. In other words, whether under the law a surveyor who is employed to plat such a town-site after its entry by the proper officer, can widen a street and in doing so cut off a portion of the buildings and improvements of the lot owners bordering on such street.

It must be kept in mind that Lewiston existed prior to the True survey. The settlers did not acquire their right under the plat nor by virtue of it. The survey and plat was made for them; they were not made for the survey and plat.

In Parcher *v.* Ashby, 1 Pac. 204, a Montana case, the court had under consideration a controversy over a strip of land 16 feet wide on Rodney Street in the town of Helena. That town-site was entered by the probate judge and the court there held that the survey must conform as near as may be to the existing rights and interest of the occupants, and that no valid and subsisting easements could be destroyed by the survey and the acceptance of the plat by the county commissioners. The court in referring to the requirements prescribed by the legislature of Montana, said:

"These regulations could not enlarge or diminish the rights or interests of occupants of the lots. And so our legislature provided that the survey and plat of the town-site should conform, as near as

might be, to the existing rights, interests, and claims of the occupants thereof. The lots were to be surveyed and the streets
283 and alleys as they existed prior to entry were to be respected and recognized. For in no other manner could the occupants obtain title to their lots according to their several rights and interests. The plat and survey of the probate judge must conform to the old survey by which the occupants had held and occupied their lots prior to the entry of the town-site; otherwise his plat and survey is so far void. * * * The rights of occupants accrued before the entry of the town-site by the probate judge, and the mere fact that his plat and survey failed to designate a street or alley as it existed before his entry and survey, does not thereby destroy such street or alley and change the ground occupied by the same into a lot that can be sold. And so, for the same reason, if this plat and survey had designated ground theretofore occupied as a lot, as an alley or street, said designation would not in any manner affect the right of the occupant to his lot."

It is there held that the plat and survey could not in any manner affect the right of the occupant to his lot. The rights of the occupant had attached prior to True's survey, and the entry of the town-site was made in trust for the occupants who were in possession of particular tracts of land as well as for the community in general. The surveyor could not divest them of their rights. The survey was for their benefit and should have confirmed those rights.

In Ashby *v.* Hall, 119 U. S., 526; 30 L. ed. 469, the Supreme Court of the United States held that the interests which the occupants possessed previous to the entry either in the land occupied by them or in rights of way over adjoining streets and alleys, were secured by it. The Court said:

"The power vested in the ligislature of the territory * * * was confined to regulations for the disposal of the lots and proceeds of the sales. These regulations might extend to
284 provisions for the ascertainment of the nature and extent of the occupancy of different claimants of lots, and the execution and delivery to those found to be occupants in good faith of some official recognition of title in the nature of a conveyance. But they could not authorize any diminution of the rights of the occupants when the extent of their occupancy was established."

Upon this point, see also Bingham *v.* Walla Walla, 13 Pac. 408.

In Goldberg *v.* Kidd, 58 N. W., 574 (S. D.) in commenting upon the word "disposed" as used in Section 2387, R. S. of the United States, the court said:

"As to the lots actually occupied when the entry was made, we think the word 'disposal' must be construed to mean 'distribution,' which words are often used synonomously, for, as to such lots, they were already disposed of, that is, they became at once the property equitably of the occupants."

In Stingfellow *v.* Cain, 99 U. S., 610, the Court said:

"The occupant of a lot at the time of the entry of a town-site is made, is its real owner."

In the case of City of Pueblo *v.* Kidd, 36 Pac., 599, it is said: "The entry of the town-site therefore, being 'in trust for the several use and benefit of the occupants thereof, according to their respective interests,' each of such occupants at the time of the entry became, to the extent of their respective holdings, beneficiaries of the trust, and were vested with equitable ownership of the lot or parcel of land to the extent of their occupancy."

E. B. True had no authority to attempt to take private property for street purposes, nor did the fact that he ran his survey where he did deprive any of the owners of their property rights which were then vested. City of Helena *v.* Albertose, 8 Mont.,
285 499; 20 Pac. 817; Tradway *v.* Wilder, 8 Neb., 91; Bingham *v.* Walla Walla, 3 Wash. Ter., 68-13, p. 408; Parchen *v.* Ashby, 5 Mont., 68-1 Pac., 204; Hall *v.* Ashby, 2 Mont., 489; Alemany *v.* City of Petaluma, 38 Cal. 553; Town of Aspen *v.* Rucker, 10 Colo., 184; 15 Pac. 791; Denver *v.* Kent, 1 Colo., 336.

It would appear from the provisions of said Section 2387 of the Revised Statutes of the United States, that such land is permitted to be entered by the proper authority for the use and benefit of the occupants thereof according to their respective interests. As above stated, such trusts exist for the benefit of the inhabitants, first as individuals, and after that, collectively as a community. And the title to occupied lots becomes vested in the trustee for the benefit of the occupants severally at the time such entry is made. If the surveyor who is employed to plat the town has the authority to cut off four feet from the lots on a certain block, he certainly has the authority to cut off more, and where is the line to be drawn? Can the surveyor make a paper street in such a town and deprive the actual occupants of vested rights? We think not. The occupants possessed certain rights in and to the lots occupied by them before the entry, and the only authority the surveyor had was to plat the town in conformity to the use and occupancy of the lots and blocks. The plat must be made for the benefit and use of the occupants. The surveyor's power was limited; he had no authority to establish streets through and over buildings nor to cut off any portions or parts of buildings for that purpose. If that were not true, it would have been better for the occupants not to have had the entry made, for they had the right to occupy their lots as they were then occupying them. If the entry was not made in their interests, their rights were not as well established after the entry as before. The object and purpose of the statutes was to bene-
286 fit the occupants and not to destroy their rights. In this case the occupants had property rights in the premises occupied by them, and the surveyor had no authority to take private property for street purposes or to establish any portion of a street on private property. The occupant's right and ownership did not come by virtue of the plat and survey; it came by reason of his possession and occupancy and the improvements that he had placed upon his lot.

As before stated, the trust of the Mayor was dual in its nature. The occupants of the lots, each as individuals, were entitled to deeds

to their lots as occupied by them. The community of the city as a whole was entitled to the unoccupied lots and the public in general were entitled to the streets. The individuals had no right under the law to encroach upon the streets, and the city had no right to appropriate a portion of the lots of the occupants for a street. The Mayor and the surveyor had no authority to change the beneficiaries under this trust.

There is no dispute in the evidence but that the defendants and their predecessors in interest claimed and occupied the lots in question to their full length. Buildings and other improvements had entirely covered the said lots. The owners occupied and possessed said lots fifty feet in length. It is not claimed or shown that any part of said lots were ever used as a street, or any part thereof, nor that the city ever claimed any part thereof as a portion of the street, and the city surveyor cannot make any portion of said lots a street by simply making a plat and indicating on such plat that said lots were only forty-five or forty-six feet in length. The Mayor-Trustee had no judicial power in this matter,—neither had the surveyor. The surveyor and mayor cannot dedicate to the public as a street, parts of lots occupied and possessed by individuals.

287 The appellant rests his case here on the making and approval of said plat. If private rights can be taken in that way, it is a novel proceeding and a proposition unknown to our law. The record clearly shows that the Mayor recognized the incorrectness of the plat, as he executed deeds showing that fact long prior to the time that said plat was filed. While the plat was made and approved in 1875, it was not recorded until 1879. The City of Lewiston is not here complaining of the erection of buildings on the lots referred to in her streets. The record clearly shows that the city has for forty-five years known that the occupants of the lots on said Block 24 were claiming that such lots were fifty feet in length and that they had buildings and other improvements covering said lots.

It is contended by counsel for appellant that none of the respondents can question the boundaries of D Street without establishing a legal or equitable title owned by him at the time of the encroachment with the buildings upon the boundaries of such street, and that no equitable title vests in an occupant other than at the time of the day of filing the application in the Land Office of the United States.

We think it sufficiently appears from the evidence that the lots in question were occupied, claimed and possessed ever since long before the application was made to enter said land, either by the present owners or their predecessors in interest, and as heretofore stated, it also appears that they claimed their said lots to be fifty feet in length, and that they or their predecessors have had improvements of some kind covering said entire fifty feet. That being true, the counsel's contention is fully met by the proof in the case.

Taking the whole record, it sufficiently appears that that portion of D Street in controversy has never been possessed and occupied and used as a street, although the other parts of the street have

288 been used since 1861, about forty-six years. We have no doubt but what appellant, regardless of the suggestions of the

city engineer, has the right to extend his building out even with the other buildings placed along said street, and that the city has no right to the use of said four feet, or thereabouts, for a part of D Street.

The judgment of the court below must be affirmed with costs in favor of the respondents.

Ailshie, C. J., concurs.

289 *Record Entry on Rehearing.*

BOISE, IDAHO, *June* 15, 1907.

SUPREME COURT, *State of Idaho, ss:*

Court met pursuant to adjournment.

Present: Hon. James F. Ailshie, Chief Justice; Hon. Isaac N. Sullivan, Justice, and the officers of the court, when the following proceedings (among others) were had, to-wit:

No. 1284.

MATHEW SCULLY, Appellant,
vs.
LOUISE SQUIER ET AL., Respondents.

A petition for a rehearing in this cause having been heretofore filed by appellants, and the court having fully considered the same, now on this day the court renders its decision *per curiam* to the effect that a rehearing be denied.

290 *Opinion of the Court.*

SCULLY
v.
SQUIER.

(On Petition for Rehearing.)

May Term, 1907.

Filed June 18, 1907. I. W. Hart, Clerk.

Per Curiam:

A petition for rehearing has been filed in this case. We will say at the outset that no discourtesy to counsel for appellant was intended in any of the statements contained in the opinion in this case. We have the utmost confidence in counsel's honor and ability.

Counsel states that in the commencement of this action and in its prosecution he largely relied on the case of Boise City *v.* Flannagan, 6 Idaho, 149, 53 Pac., 453. The facts of that case and the case

at bar are not similar or parallel. In that case one James Stout claimed the tract in controversy. A part of it he had enclosed and improved and the remaining part was not enclosed. Both the enclosed and the unenclosed lots he claimed as one tract. On the 2nd day of May, 1870, the United States conveyed by patent the land included in said Boise City town-site to Henry Elliott Prickett, then Mayor of said city, in trust for the several use and benefit of the occupants of said town-site. The Mayor had the same platted into blocks, streets and alleys and the part of the tract so claimed by Stout which had not been enclosed by him or improved in any way or manner, lay in the street. Upon proper application by Stout to the Mayor for a deed to the part so platted, a deed was issued to him by the Mayor for said fractional block, as it was called. Stout thereafter, in May, 1871, sold and conveyed said fractional block to one James Dunn, in which conveyance he also described the land in controversy and platted as a street. The land so platted
291 as a street had not been enclosed up to that date, May, 1871, and was not enclosed by said Dunn until June, 1878, and from the time that Dunn enclosed it on down to the commencement of the action the city repeatedly asserted its control and right to control over said tract as a part of the streets of said city, and repeatedly notified Dunn to remove all fences and improvements, which he promised to do.

In the case at bar, the defendants and their grantors had been in the exclusive, actual possession of all of said lots and had them covered with buildings and the parts not covered with buildings were enclosed by fences. They were in *possessio pedis* of every square foot of said lots. That being true, the city authorities had notice of their claims and the surveyor had notice that they were in actual occupation and possession of said lots fifty feet in length and had improvements thereon.

In the Flanagan case, when the surveyor came to plat Boise City, he found no improvements whatever on the tract in controversy, and platted the portion claimed by Dunn as a part of the streets of said city. Said tract laid open as a part of said streets until 1878,—for more than six years after Dunn had purchased the fractional block of Stout, before he fenced it, and when he was notified by the city authorities to remove his fence from said premises, he promised to remove it. That case is very different from the one at bar, for regardless of the E. B. True survey, and regardless of the city authorities, which authorities never at any time claimed any portion of the lots of defendants in this case, nor ever notified them to remove their improvements from any part of the lots, the defendants and their grantors had steadfastly claimed the same, and the most of them had received deeds from the Mayor for said lots fifty feet in length. Their actions and conduct could not be taken as
292 an estoppel against them; while the actions and conduct of Stout and Dunn in the Flanagan case, clearly shows that if they had any rights to the land in controversy in that case, they were such as to estop them from claiming them against the city.

In the case at bar, we find no laches, waiver of rights or ratifica-

tions of survey such as would estop the defendants from claiming said lots fifty feet in length. So far as the record shows, the city never has questioned the right of the defendants, in this action, in and to said lots for their full length, fifty feet.

Counsel also cites the City of Walla Walla *v.* Moore, 2 Pac., 187, as a case supporting his contention. The court held therein that a party may by his acts so recognize boundaries as marked out in a recorded plat of a city as to estop him from denying the correctness of such boundaries. The Court in that opinion says:

"The only title claimed by the defendants was derived from D. S. Baker and if the said D. S. Baker was not in a situation to assert his title to the land as against the public at the time he conveyed the land, it will follow, under the circumstances of the case that defendants will occupy the same situation."

It would seem from that statement in the opinion, that the grantor of the defendants in that case, at the time he sold said lots to them, was not in a position to assert his title to said land as against the city authorities. But not so in the case at bar. The grantors of the defendants in the case at bar were in a position or situation to assert their title to said lots as against the city of Lewiston, for the reason that they had buildings or enclosures covering said entire lots and were claiming them at the time the entry was made by the Mayor. There are other facts stated in the opinion in that case which show that the defendants recognized the boundaries of
293 said streets and lots and the court held as follows: "These acts and some others of a similar nature appearing in the record, in our opinion estop him as above stated." That is not a case in point.

Counsel also cites Laughlin *v.* City of Denver, 50 Pac., 917. In that case it appears from the averments of the complaint, that Laughlin entered upon the land in dispute July 13th, 1865, under a deed from Andrew and Elizabeth Sagendorf, and had held exclusive, continued and uninterrupted possession of said land until February, 1893, when the defendant city, without leave and over the protest of plaintiff, forcibly entered upon said land and removed certain houses and fences and cut down and removed certain trees, ousted and ejected the plaintiff therefrom and converted and used said land for a street. It appears that on May 29th, 1865, the city surveyor filed with the clerk of said city of Denver, a map of the then city of Denver, which was approved by the city council on June 22nd, 1865, and filed for record with the clerk and recorder of the county in which said city is located on June 29th, 1865. There is shown on said map outlot or block No. 257 in what is known as the "Western Division" of the city of Denver and to the West of said outlot is marked "Jefferson Street." The land in dispute in that case was a part of Jefferson Street and so marked. On August 29th, 1865, the Probate Judge in pursuance of the territorial statute, conveyed by deed to the defendant city the streets, lanes, avenues and alleys of the city of Denver lying within the tract of land included in said surveyor's plat, including Jefferson Street, which deed was recorded on June 8th, 1867. On July 13th,

1865, Laughlin bought from Sagendorf and wife, the occupants thereof, a tract of land enclosed by a certain fence, which included the land described in the complaint upon which there stood at the time a log house, and also the land described in said surveyor's map as outlot or block No. 257, and received from them a quitclaim deed, which Laughlin supposed described the whole tract,
294 but which, in fact, conveyed only that portion designated as outlot No. 257. Laughlin entered into possession of the land so purchased and occupied and lived in the log house situated thereon, and in 1866 planted trees and built a stable, corrall, barn and outhouses, and in 1871 built a frame house on the land in dispute, plowed and used the balance of the land for gardening and grazing purposes; occupied and used, cultivated and possessed said land uninterruptedly from July 13th, 1865, to February 10th, 1893, when the city under claim of title as aforesaid, entered upon said land and cut down and removed the trees, houses and other improvements therefrom and took possession of the land in controversy as a portion of Jefferson Street, which, up to the latter date, had not been opened or used by the defendant.

At the outset the Court says in that case that on the foregoing statement of facts, the question determinative of the right of the parties is whether the execution of the deed of August 29th, 1865, by the Probate Judge was a valid exercise of his authority as trustee and vested in the city the legal title and the right to the possession of the land in controversy and if so, whether such title and right has been lost by nonuser. In that case the plaintiff contended that the deed was unauthorized so far as the land in dispute was concerned, because no street was laid out over the same at the time of its execution, and the Court says:

"This objection would merit very serious consideration if the plaintiff was in a position to urge it since the streets which the people or legal authorities have a right to have conveyed are such only as are actually used or laid out at the time of the entry of the town-site."

And further says:

"A trustee is not authorized to designate any of the site in the possession of an actual occupant as a part of a street."

295 This last statement is what we hold in this case; that the trustee mayor had no authority to designate any part of the town-site that was in the possession of an actual occupant as a part of a street. The Court then proceeds and says:

"But in view of the relation that the plaintiff holds to the property, in our opinion he is precluded from assailing the validity of this deed upon this ground. He was not an occupant of the land at the time the town-site was entered and the title thereto vested in the trustee, nor has he ever succeeded to the right of the then occupants."

While in the case at bar, we hold from the evidence that the respondents did derive their rights from the fact of being on the land at the time it was entered by the Mayor, or derived their rights from their predecessors who were on the lots at the time. However, if in

fact the rule laid down in that case is contrary to the rule that we have laid down in this case, we are not inclined to follow it. In that case the Court held that Laughlin had no right by adverse possession, as the deed under which he claimed did not purport to convey the land in controversy and therefore did not constitute color of title. In the case at bar, the respondents and their predecessors in interest have been in the actual physical possession of the said lots their entire length, fifty feet, for thirty-five or forty years, and the city has not at any time molested, interfered with or disputed their right and ownership therein.

Laches cannot be imputed to the respondents because they have not brought an action against the city to determine their rights, as they were in possession and in absolute control of said lots. The respondents and their predecessors in interest having been in possession of the lots involved in this case, with improvements covering the entire lots, claiming them as their own and exercising acts of ownership over them, the principle of estoppel cannot be invoked against them because they have not been more aggressive and brought suits against the city for the purpose of establishing their rights thereto.

A rehearing is denied.

296 In the Supreme Court of the State of Idaho.

MATHEW SCULLY, Plaintiff,

vs.

LOUISE SQUIER, JOHN M. FIX, and JOHN Q. MOXLEY, Defendants.

Petition for Writ of Error.

To the Hon. James F. Ailshie, chief justice of the Supreme Court of Idaho.

The petition of Mathew Scully, plaintiff, respectfully shows: That heretofore, to wit, upon the — day of September 1905, there was tried in the District court of the second judicial district of Idaho, a case wherein your petitioner was plaintiff and Louise Squier, John M. Fix and John Q. Moxley, were defendants.

In the complaint or declaration in the said case, the plaintiff set up and pleaded a claim to, and the ownership of private rights, in and to D street in the city of Lewiston, Idaho, especially that strip of land, approximately four to five feet wide by several hundred feet long, being adjacent to and adjoining lot six in block 24 of the original plats of the city of Lewiston, and lying on the south side of said D street, claiming the said private rights in, upon and over the said strip of land as a part of D street by virtue and reason of the townsite laws of the Congress of the United States of America, and the official platting and survey of the said street under the said townsite laws of Congress and the laws of the territory of Idaho, applicable to the said Lewiston Townsite and alleged in the said complaint that the defendants without right were building solid

brick buildings upon the said strip of land lying and being in the said street aforesaid to the special damage of the plaintiff and his property, destroying his aforesaid private rights in the said street vested in him by the townsite laws of Congress as the owner of the said lot six upon the townsite of Lewiston which is a government townsite, entered and patented by a trustee for the uses of the occupants of the said townsite and their grantees and the use and benefit of the city of Lewiston, Idaho, vesting in each occupant and his grantee private rights in and to the said D street. The action is to abate the said public and private nuisance. In
297 the said complaint, to show the acceptance of the said plat and survey by the first owners of the lots in block 24 aforesaid, it is alleged that they applied for and received deeds to their lots according to the said plat and survey and that the lots have ever since been conveyed according to the *the* said official survey and plat and specific allegations of special damage to the plaintiff by the acts of the defendants are made, such as their acts depreciating the rental value of the plaintif-'s brick business house upon the said lot six, leaving it in a hole, destroying its symmetry with the south line of D street, cutting off view, air and ingress and egress and use of the ground appropriated by the defendants to their own exclusive private use. The defendants filed to the said complaint specific denials and also an affirmative answer wherein they themselves claim title to the said land lying in the street by virtue of the said townsite laws of Congress and allege that the aforesaid official survey was contrary to law and cut off into the street four feet approximately of their private land which from time immem*mo*rial was in the possession of themselves and their predecessors in interest and therefore the said survey and platting was absolutely void and of no force and effect and that the plaintiff by virtue of the same and the townsite laws of Congress had and has no private rights in the said land claimed by them because it is not now and never has been a part of D street in the city of Lewiston, Idaho, and that a proper construction of the land or townsite laws of the United States, relating to the townsite of Lewiston, Idaho, would deny the claimed rights of the plaintiff and establish the invalidity of the said survey and plat and require the decision against the claims of the plaintiff, which is the statement of the legal effect of the allegations of the defendants' answer herein, and of the Federal question raised and put in issue by the plaintiff's complaint and the defendant's answer herein. In Idaho, the affirmative matter is deemed denied and no reply is necessary.

The plaintiff in the trial court and also in the Supreme Court, relied upon the laws of Congress relating to the Lewiston
298 townsite, and rested his rights to relief upon the private rights in and over the said land in D street which he acquired as a grantee of the person to whom the mayor-trustee conveyed the said lot six in the said block 24, which rights, in the first instance, vested in the grantee of the said mayor trustee by virtue and force of the townsite laws of Congress, relating to the Lewiston townsite, and the ascertainment of the south boundary line of D

street by the official survey made in 1874 and authorized by the laws of Congress and the laws of 1872-1873 of the territory of Idaho, relating to the said townsite, and based his claim to the said private rights upon the premise that the said official survey under the laws of Congress and of the said territory had become binding upon the defendants and upon each of them through the acts of the first grantees who were their predecessors in interest and who accepted deeds from the mayor-trustee according to the said official survey and that under the townsite laws of Congress relating to the Lewiston townsite the aforesaid private rights of the plaintiff were conclusively established and the defendants by the townsite laws of Congress aforesaid were conclusively estopped to claim any title to the land in the said D street other that private rights in and to it as a part of D street, the same as the plaintiff herein.

Upon the trial, the said trial court allowed the defendants to impeach the said survey and to attempt to prove title by parol testimony in contradiction of the said official survey and of the deeds the first grantees accepted, and ignored the said survey and plat absolutely as though they had never been made and as though no deeds had been accepted according to it, claiming that the proper construction of the laws of Congress, relating to the townsite of Lewiston, required such holding and made it mandatory upon the court to admit evidence, tending to contradict the said official plat and survey, thereby overthrowing the title and private rights of the plaintiff in the said D street, evidenced by his deed to lot six aforesaid and the official plat and survey of the said D street.

299 The plaintiff in the said trial court contended and maintained that the correct and proper construction of the said townsite laws of Congress, and especially section 2387 of the Revised Statutes of the United States (U. S. Comp. St. 1901, P. 1457), and of the townsite laws of the territory, Session laws 1872-73, p. 16, required the court to hold that the official survey and plat of Lewiston, Idaho, especially of D street were and are conclusive and binding upon all parties to the action, that the said laws provided a scheme for the execution of the trust, held by the mayor-trustee and for a complete and speedy settlement of all boundary lines of the streets and of private property in the city of Lewiston, to be binding and conclusive upon all property owners in and upon the original townsite, and, in effect, gave a reasonable opportunity to each occupant and settler upon the said townsite to protect his rights and to compel the said official survey to correctly delineate the boundaries of the streets and of private property, and for the purpose of such opportunity gave sixty days within which to apply for deeds and make proof of occupation and the extent of occupation and that during said limitation or within a reasonable time the settler and occupant who had any objections to the said official survey might object and compel its correction, or, not wishing to compel its correction, could approve of the said survey by applying for and accepting deeds according to it and thereby waiving all objection and all claims to any part of their land which by mistake or otherwise might be cut

off into any street, and the plaintiff maintained that his construction of the aforesaid laws did not give the surveyor nor the mayor-trustee, the arbitrary power nor the right to cut off into streets the land of private owners against their will and wish and did not debar them of a remedy against the cutting off of the said land which under the constitution of the United States they have and of which they cannot be denied but gave to them all their constitutional rights. The plaintiff maintained and contended that the laws of Congress and of the territory aforesaid did not authorize the arbitrary taking of private property for streets by the mayor-
300 trustee but authorized an official survey for the purpose of the administration and execution of the trust and the complete termination of the said trust in which scheme for the execution of the said trust, every private property owner who was a beneficiary of the trust had the absolute right to act freely, had the absolute right to compel/ the correction of the official survey before accepting deeds according to it and also had the absolute right and freedom of will to waive all rights to compel/ correction and apply for and accept deeds according to the said survey and thereby consent to the vesting of titles in the city of Lewiston and in themselves according to the said official survey under and by virtue of the townsite laws of Congress, and that, therefore, in 1905, the defendants under the proper construction of the aforesaid laws of Congress and of the territory had no right whatever to attack the said official survey by evidence *aliunde* and establish, notwithstanding the said official survey other and different boundaries of their property and of D street. The plaintiff maintained and urged upon the trial that the construction of the aforesaid laws contended for by him was absolutely necessary to the safety of titles in the city of Lewiston and the certain protection of private rights in private property and of private rights in the streets which private rights had vested under and by virtue of the said laws of Congress and ascertained and bounded under and by virtue of the laws of the territory in the execution of the trust; that the scheme for the confirmation of titles and the ascertainment of the boundaries of private and public rights was reasonable and did not deprive any one or person of any right or rights contrary to the Constitution of the United States, and that the limitation of sixty days applied to those in possession as well as those out of possession, and that the proper construction of the aforesaid laws of Congress and of the territory made them apply to persons in possession and required them to take necessary steps to get title to all the land in the possession of which they were when title vested in them under the said townsite laws of Congress, and that inasmuch as the legislature of the territory devised the
301 method and scheme for the confirmation of their title through an official survey and the execution of deeds upon that official survey, they had the right to make the official survey properly delineate the correct boundaries between their private property and the streets of the city before they accepted and received the confirmation of their title by and through a deed of a trustee and accepting the confirmation of their title without requir-

ing a correction of the said survey they thereby waived all rights to have title to anything surveyed in the street confirmed to them and could not get it confirmed to them by a judgment of the court in 1905 without correction of the official survey, and, notwithstanding the said official survey, and upon evidence which should have been introduced in a court before they accepted deeds upon the official survey in an action, seeking to have the official survey corrected so that it would through a deed confirm to them all their private rights. This construction of the aforesaid laws does not take title from any person contrary to the constitution of the United States any more than does any statute of limitation in force in any state of the Union, but gives force to the laws for the execution and administration of the trust under the townsite laws of Congress, so much so that a limitation in the townsite laws of the territories has been upheld by the Supreme Court of The United States in the case of Cofield *vs.* McClellan, 16 Wall., 334, as a reasonable regulation and in the decision of the state courts. Therefore, the plaintiff maintained and contended that the limitation in the laws of the territory of Idaho aforesaid of sixty days operated against those in possession and required them to apply for all the property they claimed to own, or within the sixty days apply for the property they claimed and at the same time apply for a correction of the official survey if it cut off any of their property and if the survey was not corrected transfer the proceedings to the courts and compel a correction of the official survey to make it delineate the correct boundaries of their occupation just as some of the townsite occupants did as evidenced in the record, and failing to get a correction before the acceptance of deeds upon the said official survey, the acceptance of such deeds con-
302 firmed the survey as correct and concluded all question as to its correctness and as to the boundaries of D street as to the person thus confirming the said official survey.

The trial court refused to adopt the plaintiff's aforesaid construction of the law and ignored the said official survey and heard evidence as to the boundaries of the street and as to occupation of private owners and changed the south boundary of D street and confirmed the title of the defendants in and to the said parcel of land, lying in D street claimed by them, and thereby reopened the trust, readministered it, changed the administration by the mayor-trustee, and thereby, through a misinterpretation and misconstruction of the aforesaid townsite laws of Congress and of the territory, relating to the townsite, destroyed the private rights of the plaintiff claimed by him as aforesaid under the aforesaid townsite laws, and administered in 1905 a trust which had been closed over thirty years before by and through the acceptance of Deeds upon the aforesaid official survey and administered it without any authorization of law contained in the said laws of Congress and of the said territory, whatever, and, too, upon evidence totally insufficient in law or in equity to show that the defendants or any of their predecessors by occupation acquired an equitable title under the laws of Congress, without proving when the application to enter the Lewiston Townsite was filed in the United States land office, though it is alleged and

found by the court to have been filed on the 21st of November, 1871, and without proof of the specific occupation of any certain person upon the said 21st of November 1871 of the specific property claimed by the defendants, save only as to that claimed by Louise Squier.

And the Hon. Edgar C. Steele, before whom the case was tried, adjudged and decreed that the plaintiff had no rights under the townsite laws of Congress and of the territory and dismissed the action and adjudged costs against the plaintiff in favor of the defendants and entered the said judgment in the records of his said court.

In the said trial court, the plaintiff contended also that the
303 proper interpretation and construction of the townsite laws of Congress and of the said territory required the holding that Louise Squier and John M. Fix were not and could not be the owners of an equitable title by virtue and force of the townsite laws of Congress because they had no deed specifically describing the property lying and being in the street in addition to the lot description and did not in this way connect themselves in interest with the person in whom, if it ever was, vested the equitable title by the laws of Congress and the plaintiff relied upon the case of Laughlin *vs.* Denver, 50 Pac. 917, 24 Colo. 255, but the trial court refused to so interpret and construe the said laws of congress and of the territory.

Thereafter the plaintiff made a motion in the said trial court for a new trial and which was overruled by the said court and entered of record on the 27th of November, 1906, and the plaintiff thereafter procured a certified transcript of all the records of the said trial court, containing all the evidence, all the pleadings and all the files in which and by which all the foregoing questions as to the proper construction and interpretation of the laws of Congress and of the territory aforesaid were properly preserved and presented and on the *the* 8th of December, 1906 appealed the case to the supreme court of the state of Idaho, perfected the appeal and filed the aforesaid transcript of record therein and thereafter filed briefs, made an oral argument, presented the aforesaid contentions as to the construction and interpretation of the said laws of Congress and thereafter the said Supreme court decided adversely to every contention and every construction and interpretation of the said laws contended for by the plaintiff and held that the plaintiff had no rights whatever under and by virtue and force of the said laws of Congress and of the said territory and decided against the private rights claimed by the plaintiff under the said laws and in all things affirmed the judgment of the lower court and readministered and re-executed the trust which thirty years before had been executed and closed by the trustee and the first owners of lots 6, 5, 4, 3, 2, in block 24 of the city of Lewiston and changed the south boundaries of D street
304 and the north boundaries of the lots owned by the defendants so as to include in the said lots the land claimed by the defendants, lying and being in D street aforesaid according to the aforesaid official survey, and the said court arbitrar-ly reopened and reexecuted the said trust without any cause therefor and in viola-

tion of the townsite laws of Congress and of the territory of Idaho and in violation of article XIV of the constitution of the United States, section one thereof, on and because of the notion and claim that the mayor-trustee could not cut off into the street the said parcel of land aforesaid by his official survey and as he attempted to so do the survey as to the placing of the said strip in the street was and is absolutely void notwithstanding the trust had been completely executed closed and determined with the consent of the first owners of the lots claimed by the defendants upon and according to the said original survey. If the objection to the survey had been made at the opportune time and before the right to object had been lost by being waived and before the trust had been closed and executed and determined, the plaintiff admits that against the consent and objection of townsite occupants of the property claimed by the defendants, the mayor trustee could not cut it off into the said D street and would have been compelled to change the survey as the said Supreme court has changed it by its judgment aforesaid but the right to have the trust administered differently than it was administered by the said mayor-trustee has been lost many years ago and the defendants are conclusively bound by the administration of the trust on the part of the mayor-trustee and the first owners of the aforesaid lots according to which administration of the said trust by the mayor-trustee and the first owners of the said lots the private rights of the plaintiff vested under the aforesaid townsite laws in and to the said strip claimed by defendants as a part and parcel of D street. And on the 18th of June, 1907, after affirming the judgment of the said trial court, the said supreme court of Idaho denied the petition for rehearing and, then and there, the judgment affirming the lower court became final.

And your petitioner hereinbefore and now shows that there
305 is a Federal question involved in the case aforesaid and that the pleadings and issues therein involve and the complaint raises and presents the Federal question, namely:

First.

The plaintiff claims and asserts private rights of property in D street and in and to the strip of land lying and being in D street of the city of Lewiston, Idaho, aforesaid, which private rights vested in him under and by force of the aforesaid townsite laws of Congress as the owner of said lot six in said block 24 in the city of Lewiston, which had been conveyed by its first owner, the United States, by the Mayor-trustee, to its occupant under the aforesaid townsite laws of Congress as administered and confirmed according to the laws of the territory aforesaid according to the aforesaid official survey, and together with which occupancy and conveyance the said townsite laws vested in and to the said grantee of the said lots private rights in and to all of said D street according to the said official survey which rights the plaintiffs now own and possess and which rights in the said street as officially surveyed became confirmed and absolutely vested in and as a part of the rights appurtenant to said lot six under the laws of Congress upon the defendants accepting deeds

according to the said survey and thereby confirming all rights of public and private easement in the said D street as officially surveyed, permitting all rights of public and private easement to be vested by the said townsite laws of Congress according to the said survey and the boundaries of said D street as officially ascertained by the said mayor-trustee, and in violation of the said laws of Congress and repugnant thereto, the said supreme court has decided against the title and private rights of the plaintiff vested in him by the townsite laws of Congress and of the territory aforesaid and held that the title claimed by him never vested under and by virtue of the aforesaid laws of Congress.

"Second.

The construction of the said townsite laws of Congress is presented and the construction of the aforesaid state courts is adverse to the construction contended for by the plaintiff and the state
306 courts' construction of the said laws of Congress is erroneous, incorrect and wrongfully deprives the plaintiffs of his private rights which he asserts and claims vested in him by force and virtue of the said townsite laws of Congress and which private rights are now owned and possessed by him.

Your petitioner represents that the claims of ownership of the defendants adverse to the aforesaid private rights of the plaintiff in and to said D street as officially surveyed and ascertained was and is repugnant to and in violation of the laws of the United States, relating to the said Lewiston Townsite and repugna-t to and in violation of the reasonable regulations of the laws of the territory aforesaid which regulations under the laws of Congress are
307 valid, and the judgment of the Supreme Court of the State of Idaho, and of the court of the said second judicial district was and is repugnant to and in violation of the laws of the United States, and especially of those acts of the Congress of the United States commonally called the "Townsite acts" and especially of the fourteenth amendment to the constitution of the United States the said judgments of the said courts are repugnant and in violation of, depriving the plaintiff of private rights for the benefit and private use of the defendants. As aforesaid, the supreme court of the state of Idaho, on the 18th of June, 1907, rendered its final judgment upon a complete transcript and record of the aforesaid case from the said trial court, containing all the files, pleadings and evidence in the case and presenting all the issues aforesaid, and thereby affirmed the judgment of the trial court, wherein it is adjudged that the defendants by virtue of the aforesaid townsite laws of Congress own the land in the street, claimed by them and have a right, therefore, to build their bricks upon the same and that the plaintiff has no private easement or private rights in and upon the said ground claimed by the defendants and no private right, because of the defendants' ownership of the said land claimed by the defendants, which were divested by the acts of the defendants contrary to the Constitution of the United States and contrary and in violation of the townsite laws of Congress aforesaid, and the said judgment of the said supreme court was and is a final judgment in

the highest court of law or equity of the state of Idaho in which a decision in said suit could or can be had, and the said Supreme Court of Idaho is the highest court of law or equity in Idaho.

Petitioner further shows that Federal Question was made in said case, to wit, as hereinbefore set out and that said judgment of the said Supreme court was repugnant to and in conflict with the fourteenth amendment to the constitution of the United States, repugnant to and in conflict with the laws of the United States, and the said townsite acts of Congress, and that said judgment of the said supreme court was contrary thereto, and that a decision of said Federal question was necessary to the judgment rendered by the said supreme court.

Wherefore, your petitioner presents herewith an exemplified transcript of the record of the supreme court of the state of
308 Idaho in said case and prays that a writ of error to said Supreme Court be allowed; that citation be granted and signed; that the bond herewith presented be approved, and that upon compliance with the terms of the statute in such cases made and provided said bond and writ of error may operate — a supersedeas, that the errors complained of may be reviewed in the Supreme Court of the United States, and the judgment aforesaid of said Supreme Court of Idaho, be reversed.

MATTHEW SCULLY,
Petitioner.
BEN. F. TWEEDY,
——— ———,
Attorneys and of Counsel for Petitioner.

The writ of error as prayed for in the foregoing petition is hereby allowed this 19th day of August, A. D. 1907, the writ of error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of $500.00. Dated at Grangeville Idaho this 19th day of August, A. D. 1907.

JAS. F. AILSHIE,
Chief Justice, Supreme Court, Idaho.

Filed in my office this 29th day of August, A. D. 1907.
I. W. HART,
Clerk Supreme Court of Idaho.

308½ [Endorsed:] In the Supreme Court of the State of Idaho. Mathew Scully, plaintiff and appellant, *vs.* Louise Squier, John M. Fix, and John Q. Moxley, defendants and respondents. Petition for writ of error to Supreme Court of State of Idaho. Filed Aug. 29, 1907. I. W. Hart, Clerk.

309 In the Supreme Court of the State of Idaho.

MATHEW SCULLY, Plaintiff in Error,
vs.
LOUISE SQUIER, JOHN M. FIX, and JOHN Q. MOXLEY, Defendants in Error.

Assignment of Error on Writ of Error.

And now, before the justices of the Supreme Court of the United States of America, at the Capitol, in the city of Washington, comes Mathew Scully, plaintiff in error, by his counsel, in the above stated case, and says assigning error therein—*says:* That in the record and proceedings in the aforesaid cause there is manifest error in this, to-wit:

First. That the Supreme Court of the State of Idaho erred in adjudging and decreeing that the plaintiff in error had and owned no private rights, no easement or anything in that portion of D street claimed by the defendants in error, which vested under and by virtue of the townsite laws of the United States, especially section 2387 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1457) and under the regulations for the administration of the trust adopted by the legislature of the Territory of Idaho, session laws 1872-73, p. 16, and erred in adjudging and deciding that the official survey of D street made by the mayor-trustee in 1874 was not conclusive and exclusive evidence in 1905 in the above cause of the boundaries of D street and of the boundaries of the property of the defendants in error, and erred in adjudging and deciding upon evidence tending to contradict the aforesaid survey that the boundary line of D street on the south side thereof was to the north of the said official boundary line; erred in adjudging and deciding that the trust as between the predecessors of the defendants in error who accepted deeds from the mayor-trustee was not completely executed, terminated and closed by and with the consent of said predecessors; erred in adjudging and deciding that the said trust could be opened, re-examined and re-executed in the above stated case in 1905; erred in reopening, re-executing and readministering the said trust and erred in executing and enforcing the said trust otherwise
310 than according to the said official survey, accepted by the predecessors of the defendants in error who applied for and received deeds in complete execution of the trust on the part of the mayor-trustee; erred in adjudging and holding that because the mayor-trustee and his surveyor did not have the power against the will and wish of said beneficiaries or said predecessors to cut off the four feet into D street that, therefore, the said survey as to that cut off into the said street was and is absolutely void, inasmuch as the said predecessors had their title confirmed upon and according to the said survey and there was nothing cut off into the street without their consent and approval; erred in not enforcing the sixty day limitation of the laws of the said territory against

the defendants in error and their predecessors though they may have been in possession of the ground in the street claimed by them, for the reason that the statute of sixty days' limitation bars the rights of those in possession as well as those out of possession and destroys the trust relation existing between them and the trustee just the same and in the same way that any statute of limitation destroys vested rights of any beneficiary and deprives him of the right to execute the trust in the courts of the land, and the said supreme court erred in refusing to adjudge*d* and decide*d* that by reason of the said limitation, laches and estoppel, the defendants could not enforce the trust claimed by them in and to the said parcel of land lying and being in D street of the city of Lewiston, Idaho; errred in adjudging and deciding that the defendants in error had and owned the equitable title in and to the said land, lying and being in D street; erred in adjudging and deciding that the proper construction of the aforesaid townsite laws of Congress and of the aforesaid regulations of the territory of Idaho made it the duty of the courts to repudiate the said official survey and to reexamine, reopen and again enforce a trust under the townsite laws as between the trustee and the beneficiaries of the trust just the same as if the said trust had not been administer-, executed and closed under the regulations for its administration with the consent of the beneficiaries provided by the territorial legislature;
erred in adjudging and deciding to deny to plaintiff in error,
311 a new trial.

Second. That the supreme court of the state of Idaho erred in adjudging and deciding that the predecessors of the defendants in error after they had accepted deeds upon the said official survey in confirmation of their title under the said townsite laws of Congress were in a position and had the right to assert title to the said parcel of land, lying and being in said D street against the city of Lewiston, and the reason of the error is that said predecessors by applying for and receiving deeds to the lots as described in the said official survey thereby consented to the dedication of D street as surveyed and consented to the official survey as properly bounding the said street and as describing correctly that part of the public domain which under the townsite laws of Congress vested in the city of Lewiston for public use and occupation and the proper construction of the said townsite laws and the said regulations for the administration of the trusts by the mayor-trustee requires and compels the courts to hold that the predecessors of the defendants in error consented to the dedication of the street as bounded by the official survey since they accepted deeds upon a survey of their lots which also gave the boundaries of the said street for the purpose of its being vested under the townsite laws in the city of Lewiston, or in other words for the purpose of ascertaining the boundaries and extent of the rights of property which vested by force of the said laws prior to the survey in the city of Lewiston and in occupants of lots or portions of the public domain within the townsite. It was never intended by Congress that the trust could be held in abeyance for 30 years by

someone holding possession of ground that he never applied for or made any question concerning prior to receiving deeds to lots according to the official survey but Congress intended in providing that the states or territories could make regulations for the administration of the said trusts that the trust relations should be quickly and expeditiously settled, measured, ascertained and terminated by the trustee confirming the title with a conveyance. If the
312 government, itself had directly made deeds to the city of Lewiston, Idaho, of its streets and to the inhabitants of the townsite, according to the boundaries of actual occupations of private property and of streets, for the purpose of making such deeds, it would have had to first officially survey such occupations of streets and of private owners and provide that the private occupants make proof in the land office of their occupations and boundaries according to the lines of the said official survey and if anyone applied for deeds and made such proof without suggesting to the land office that the official survey cut off some of his land and put it into a street, he would not be permitted to claim thereafter the part cut off into the street though under the townsite laws he had a title to it and had a right to make the land office correct the survey so as to permit him to have a deed to the said land placed in *in* the street by the said official survey, and this is necessary because the trust must be speedily executed, closed and completed and the rights of all measured by an official survey, the rights of the city as well as the rights of private persons. The correction of the official survey must precede the delivery of deeds to any part of the land to an occupant as between him and the city of Lewiston to the end that the rights of the townsite occupants may be settled and not left open to be settled by testimony, the recollections of old men thirty years after the survey and the receipt of deeds according to the survey. Such a thing is too dangerous and uncertain to warrant a construction of the townsite laws and of the acts of the territory aforesaid which will permit it to be done and the supreme court of the state of Idaho erred in refusing to adjudge and decide that the official survey was and is absolutely binding upon the plaintiff in error and upon the defendants in error and vested property rights under and by virtue of the townsite laws of Congress.

Plaintiff in error says that said judgment of the said supreme court of Idaho is repugnant to and in conflict with the laws of the United States and especially the said section 2387 of the United States — and the townsite laws of the territory passed and
313 enacted as the regulations for the administration of the trust created by reason of the entry of the said Lewiston townsite and repugnant to and in conflict with Article XIV., sec. I of the constitution of the United States, which declares that "no state shall make or enforce laws, which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law," and the said judgment is against the title and private rights of the plaintiff in error which he claims and owns under and by virtue of the

aforesaid townsite laws of Congress, and adjudges that he has no such title or private rights, against and contrary to the said townsite laws of Congress and denies to the plaintiff his private rights and private property which he owns and which vested in him and his predecessors in interest by virtue and force of the aforesaid townsite laws of Congress.

Plaintiff in error says that in the aforesaid suit there was drawn in question a Federal question, to-wit: the aforesaid townsite laws of Congress and the rights of the plaintiff in error under and by virtue of the said townsite laws and his claim of ownership of private rights and easements, vesting in him and his predecessors in interest under and by force of the aforesaid townsite laws and the correct interpretation and construction of the said townsite laws to the end of establishing the aforesaid claim of private rights of property aforesaid and the judgment aforesaid of the said court takes from the plaintiff in error property and private rights vested in him and his predecessors by force of and virtue of the aforesaid townsite laws and decides against the plaintiff's said rights of property and title thereto contrary to the said townsite laws and contrary to the aforesaid article XIV, sec. I, of the constitution of the United States; to which judgment and decision, the plaintiff hereby excepts and assigns the same as error.

314 Wherefore the said Mathew Scully prays that the judgment and decision aforesaid may be reversed, annulled, and altogether held for naught and that he may be restored to all things which he has lost by the action and because of the said judgment and decision.

BEN F. TWEEDY,
Attorneys and of Counsel for Plaintiff in Error.
MATHEW SCULLY,
Plaintiff in Error.

Indorsed: In the Supreme Court of Idaho. Mathew Scully, Plaintiff in error, *vs.* Louise Squiers, John M. Fix and John Q. Moxley, Defendants in error. Assignment of error on writ of error to the Supreme Court of Idaho. Filed Aug. 29, 1907. I. W. Hart, Clerk.

315 In the Supreme Court of the State of Idaho.

MATHEW SCULLY, Appellant,
vs.
LOUISE SQUIER, JOHN FIX, and JOHN Q. MOXLEY, Respondents.

Order Allowing Writ of Error from the Supreme Court of the United States to Supreme Court of Idaho.

The above-entitled matter coming on to be heard upon the petition of the appellant therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Idaho, and upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to pre-

sent in the Supreme Court of the United States the questions presented by the record in said matter—

It is ordered that a writ of error be, and is hereby, allowed to this court from the Supreme Court of the United States, and that the bond presented by said petitioner be, and the same is hereby approved.

J. F. AILSHIE,
Chief Justice of the Supreme Court of the State of Idaho.

Indorsed: In the Supreme Court of the State of Idaho. Mathew Scully, Appellant, *vs.* Louise Squier, John M. Fix and John Q. Moxley, Respondents. Order allowing writ of error from Supreme Court of the United States to Supreme Court of Idaho. Filed Aug. 29, 1907. I. W. Hart, Clerk.

316 In the Supreme Court of the State of Idaho.

MATHEW SCULLY, Appellant and Plaintiff in Error,
vs.
LOUISE SQUIER, JOHN M. FIX, and JOHN Q. MOXLEY, Respondents and Defendants in Error.

Bond on Writ of Error from Supreme Court of United States to Supreme Court of State of Idaho.

Know all men by these presents that we Mathew Scully, as principal, and Benjamin Dill and D. O. Powell, as sureties, are held and firmly bound unto Louise Squier, John M. Fix and John Q. Moxley in the sum of Five Hundred ($500) dollars, to be paid to the said obligees, their successors, representatives, and assigns; to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 3rd day of August, A. D., 1907.

Whereas the above named plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the state of Idaho.

Now, therefore, the condition of this obligation is such that *is* the above named plaintiff in error shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

MATHEW SCULLY.
BENJAMIN DILL.
D. O. POWELL.

317 Signed, sealed, and delivered in presence of
ELIZABETH DILL.
ALBERT R. STIFFEL.

STATE OF IDAHO, *County of Nez Perces, ss:*

On this 3rd day of August, 1907, before me, personally appeared Mathew Scully and Benjamin Dill and D. O. Powell, to me known to be the persons described in and who executed the foregoing bond, and acknowledged that they executed the same as their free act and deed.

RAY C. HYKE,
[SEAL.] *Notary Public, Nez Perces County, Idaho.*

I hereby approve the foregoing bond and sureties this 19th day of August, 1907.

J. F. AILSHIE,
Chief Justice of the Supreme Court of the State of Idaho.

STATE OF IDAHO, *County of Nez Perces, ss:*

Benjamin Dill and D. O. Powell being first duly sworn upon their oath, each for himself and not one for the other, says that he is a resident, householder and freeholder in Nez Perces County, Idaho, and over and above all liabilities, obligations and exemptions from Execution, is worth over One Thousand Dollars.

BENJAMIN DILL.
D. O. POWELL.

Subscribed and sworn to before me this 16th day of August, 1907.

[SEAL.] RAY C. HYKE,
Notary Public, Residing at Lewiston.

318 Indorsed: In the Supreme Court of the State of Idaho. Mathew Scully, Plaintiff in error, *vs.* Louise Squier, John M. Fix and John Q. Moxley, Defendants in error. Bond on Writ of Error. Filed Aug. 29, 1907, I. W. Hart, Clerk.

319 The Supreme Court of Idaho.

MATHEW SCULLY, Plaintiff in Error,
vs.
LOUISE SQUIER, JOHN M. FIX, and JOHN Q. MOXLEY, Defendants in Error.

Citation to Defendants in Error.

UNITED STATES OF AMERICA, *ss:*

To Louise Squier, John M. Fix and John Q. Moxley and to the Hon. I. N. Smith, their attorney, Greeting:

You the aforesaid defendants in error and each of you are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date

hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of Idaho, wherein Mathew Scully is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James F. Ailshie, Chief Justice of the Supreme Court of Idaho, this 16th day of Sept. 1907, in the year of our Lord one thousand Nine hundred and seven.

JAMES F. AILSHIE,
Chief Justice of the Supreme Court of the State of Idaho.

Attest:

[Seal of Supreme Court, State of Idaho.]

I. W. HART,
Clerk of the Supreme Court of Idaho.

Copy of the within citation received this — day of ——, A. D. 1907, by the defendants in error and by their attorney, Hon. I. N. Smith.

——— ———,
Attorney for Defendants in Error.

(NOTE.—Over for proof of service.)

320 STATE OF IDAHO, *County of Nez Perces, ss:*

On this 26th day of September 1907, personally appeared before me, a notary public in and for said county and State, Louis D. Schattner and made oath that he delivered a copy of within citation to each of the defendants in error, to wit: one copy of said citation to Louise Squier, one copy thereof to John M. Fix and one copy thereof to John Q. Moxley which copies were delivered on the 25th day of September 1907.

LOUIS D. SCHATTNER,
Deputy U. S. Marshal.

Sworn to and subscribed before me this 26th day of September, 1907.

[Seal of E. O'Neill, Notary Public, Nez Perces Co., Idaho.]

E. O'NEILL,
Notary Public in — for the County Aforesaid.

320½ [Endorsed:] In the Supreme Court of the State of Idaho. Mathew Scully, Plaintiff in Error, *vs.* Louise Squier, John M. Fix and John Q. Moxley, Defendants in Error. Citation to defendants in Error. Filed on Return, Oct. 1, 1907 I. W. Hart, clerk R. 304 Civ., 9/23-07.

321 In the Supreme Court of the State of Idaho.

MATHEW SCULLY, Plaintiff in Error,
vs.
LOUISE SQUIER, JOHN M. FIX, and JOHN Q. MOXLEY, Defendants in Error.

Certificate of Clerk.

I, I. W. Hart, clerk of the supreme court of the State of Idaho, do hereby certify the foregoing transcript to be a full, true and correct copy of the record and proceedings in the above and therein entitled cause as the same remains of record and on file in the office of the clerk of said court and that the same constitute the return to the annexed writ of error.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court this 21st day of October, A. D., 1907.

[Seal of Supreme Court, State of Idaho.]

I. W. HART,
Clerk of the Supreme Court, State of Idaho.

322 In the Supreme Court of the State of Idaho.

MATHEW SCULLY, Appellant,
vs.
LOUISE SQUIER, JOHN M. FIX, and JOHN Q. MOXLEY, Respondents.

Order Allowing Writ of Error from the Supreme Court of the United States to Supreme Court of Idaho.

The above-entitled matter coming on to be heard upon the petition of the appellant therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Idaho, and upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter—

It is ordered that a writ of error be, and is hereby, allowed to this court from the Supreme Court of the United States, and that the bond presented by said petitioner be, and the same is hereby, approved.

J. F. AILSHIE,
Chief Justice of the Supreme Court of the State of Idaho.

Filed Aug. 29, 1907.
I. W. HART, *Clerk.*

I, I. W. Hart, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the preceding and annexed contains a true and correct copy of the original order allowing writ of error from the Supreme Court of the United States to Supreme Court of Idaho and filing mark thereon, filed in the above entitled cause, on the 29th day of August, A. D. 1907 and now on file in my office.

Witness my hand and the seal of the Court this 29th day of August A. D. 1907.

[Seal of Supreme Court, State of Idaho.]

I. W. HART, *Clerk.*

323 [Endorsed:] Supreme Court, State of Idaho. Mathew Scully, Appellant, *vs.* Louise Squier, John M. Fix and John Q. Moxley, Respondents. Certified Copy of Order Allowing Writ of Error from the Supreme Court of the United States to the Supreme Court of Idaho.

324 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Idaho, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Idaho before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Mathew Scully, plaintiff in error, and Louise Squier, John M. Fix and John Q. Moxley, defendants in error wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of,
325 or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error hath happened to the great damage of the said Mathew Scully as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within Sixty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and

according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 16th day of September, in the year of our Lord one thousand nine hundred and seven.

[Seal United States Circuit Court, Idaho.]

A. L. RICHARDSON,
Clerk of the Circuit Court of the United States for the District of Idaho.

Allowed by

——— ———,
Associate Justice of the Supreme Court of the United States.

326 [Endorsed:] In the Supreme Court of the United States. Matthew Scully, Plaintiff in Error *vs.* Louise Squier, John M. Fix and John Q. Moxley, Defendants in Error. Writ of Error. Filed Sept. 16, 1907 I. W. Hart, Clerk Supreme Court of Idaho.

327 *Return to Writ.*

UNITED STATES OF AMERICA, *Supreme Court of Idaho, ss:*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of said supreme court, at Boise, Idaho, this 21st day of October, 1907.

[Seal of Supreme Court, State of Idaho.]

I. W. HART,
Clerk of the Supreme Court of the State of Idaho.

Costs of Suit.

Plaintiff's Costs $20.35, paid by Matthew Scully.
Defendant's costs 2.50, paid by Louise Squier *et al.*
Costs of Transcript $53.60, paid by Matthew Scully.

Endorsed on cover: File No. 20,895. Idaho supreme court. Term No. 492. Mathew Scully, plaintiff in error, *vs.* Louise Squier, John M. Fix, and John Q. Moxley. Filed October 28th, 1907. File No. 20,895.

18

Office Supreme Court, U. S.
FILED.
DEC 7 1908
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. [redacted] 21.

MATHEW SCULLY, PLAINTIFF IN ERROR,

vs.

LOUISE SQUIRES, JOHN M. FIX, AND JOHN Q. MOXLEY, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF IDAHO.

BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS WRIT OF ERROR.

H. WINSHIP WHEATLEY,
Attorney for Plaintiff in Error.

BEN. F. TWEEDY,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 197.

MATHEW SCULLY, PLAINTIFF IN ERROR,

vs.

LOUISE SQUIRES, JOHN M. FIX, AND JOHN Q. MOXLEY, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF IDAHO.

BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS WRIT OF ERROR.

The defendants in error, since the preparation and printing of the brief of plaintiff in error on the merits, which had not been filed, have made a motion to dismiss the writ of error and have assigned eight grounds therefor. The question of the jurisdiction of the Supreme Court of the United States has been considered at length in the brief on the merits, which is filed herewith, and the authorities sustaining such jurisdiction are cited on pages 21 to 30, inclusive; the facts stated on pages 1 to 16, inclusive, and the assignment of errors stated on pages 16 to 20, inclusive, of the brief on the merits, to which pages of that brief the plaintiff in error respectfully refers the court. A summary of the authorities upon the Federal question is found on pages 65 and 66 of

the brief on the merits, and the territorial regulations are set out on pages 10 to 16, inclusive, thereof.

Now, since the making of the motion and service of the brief in support thereof, the plaintiff in error deems it best to add briefly to what he has already said upon the jurisdiction of the court on the writ of error.

FIRST.

The defendants in error have a misunderstanding of the record and of the questions raised by the record. There are two boundary lines claimed for the south side of D street. One, the official, depends upon conclusive, undisputed, written, documentary evidence; and the other, the use boundary, depends upon uncertain, incompetent, immaterial parol testimony, which testimony was strenuously objected to by the plaintiff in error from the first to the last. There is no dispute as to the location of the official boundary on the south side of D street, because it is located by the field-notes of the survey of block 24 and of D street, and found on the ground by both city engineers who testified in the case, and is conclusively established to be at the north end of the brick building of the plaintiff in error, and admitted in the answer of the defendants in error, the findings of fact, and in the opinion of the Supreme Court of the State (Record, pages 6 to 23, inclusive; 26 to 55, inclusive; 117 to 131, inclusive). The court received this evidence, which could not be disputed, but its effect was destroyed by the court's construction of section 2387 of the Revised Statutes of the United States, by which construction the Supreme Court of the State overthrew the official survey of block 24, lots 2, 3, 4, 5, and 6, and of D street, on the ground that the acts of the surveyor and mayor-trustee were absolutely void, because they took private property without due process of law and put it in D street. In order to hold thus, the courts had to go behind the official survey and the confirmation of equities thereupon by the mayor-trustee, as commanded and required by the afore-

said laws of Congress and by the regulations of the Territory, and find, upon parol testimony, the size of lots by occupation as though there had never been an official survey and confirmation thereon, and hold that possession and occupation kept alive the equities which had vested under the law of Congress, though the defendants in error had no confirmation of title to the ground in the official street which they claim and though the said ground had never been surveyed as private property, but was surveyed as public property.

The defendants in error claim that the courts have found that there was an amended survey of D street and of block 24, but the difficulty with the contention is that the field-notes of the survey, on pages 53 and 54 of the record, show no such amendment, and the engineers surveyed the block and the street and found no such amendment. This is undisputed and is conclusive. The field-notes control the map or plat; the description of deeds and the monuments on the ground control the field-notes; so that drawing a red line on a plat cannot amend an official survey, because the plat depends for its correctness upon the field-notes; the field-notes correct it. The courts understood this, and therefore proceeded to hold that the laws of Congress made the official survey void and not conclusive.

The regulations of the Territory required the confirmation to be made upon an official survey and provided for no confirmation without an official survey; they required only property surveyed as private property to be deeded to private persons and forbade the deeding of any part of the surveyed streets to private persons. The State Supreme Court has overthrown these regulations and holds that the law of Congress required the confirmation to be according to actual occupation, without any reference to the official survey. The regulation that the confirmation must be upon and according to an official survey is reasonable and valid and not void, as being in contravention of the laws of Congress.

This being true, the only remedy there was for the occupant under the laws of Congress was a suit in equity to com-

pel an official survey of what he claimed as his private property, in order that it might be confirmed to him as private property upon an official survey of it as private property, which remedy was absolutely lost by accepting deeds upon the official survey. The plaintiff in error urged this point upon the State courts, but the court held that possession and occupation of ground surveyed as a street continued the equitable title under the laws of Congress, thereby overthrowing the regulations of the Territory as being in violation of the law of Congress.

There is no provision in the regulations of the Territory for the survey, as private property, of land claimed to be cut off into a street after deeds in confirmation of equities vesting under the laws of Congress; and there being no such regulation, the only thing the court could do in 1905 was to compel a correction of the official survey of D street and of block 24, so as to include in the lots of the defendants in error the land they claim, which is now a part of the officially surveyed street. The defendants in error are unable to point to the court a line of evidence of an amended survey or of a survey as private property of the land now claimed by them.

It now appears plainly that the position of the plaintiff in error is that the official survey, the field-notes, of lots 2, 3, 4 5, 6, and of block 24 and of D street are the exclusive, conclusive, and only evidence the court could receive as to the south boundary of D street, and that all other evidence is incompetent and immaterial. THIS IS A QUESTION OF LAW. The law of Congress makes them such evidence, but the State courts have held that the law of Congress makes them absolutely void, because the mayor-trustee and his surveyor could not cut off private property into the street.

THE STATE COURTS WOULD NOT HOLD THAT THE ACCEPTANCE OF DEEDS UPON THE OFFICIAL SURVEY WAS A CONSENTING ON THE PART OF THE BENEFICIARIES TO THE CUTTING OFF INTO THE STREET, AND THAT THEREFORE THE CONFIRMATION WAS LEGAL UNDER THE LAW OF CONGRESS, AND THE SURVEY BECAME BINDING AND CONCLUSIVE AS TO THE BOUNDARIES

OF D STREET, AND ALL OTHER EVIDENCE WAS INCOMPETENT AND IMMATERIAL.

So it follows that the findings of the State courts, based upon incompetent and immaterial evidence, cannot be considered upon this motion to dismiss the writ of error; the boundary by use, which conflicts with the boundary as established by the official survey; the size of lots by use or occupation, which conflicts with the size by the official survey; the size of D street by use, which conflicts with the size by the official survey, cannot be considered, for these things cannot be proven under the law of Congress after confirmation of title upon the official survey. This takes from the controversy everything which has been urged as questions of fact and leaves nothing but questions of law for the consideration of the court.

THE POINT IS, THAT SINCE THE OFFICIAL SURVEY CAN BE MADE TO CONFORM TO ACTUAL OCCUPATION BY AN ACTION IN EQUITY BEFORE CONFIRMATION IS ACCEPTED THEREON, IT BECOMES AFTER CONFIRMATION THE EXCLUSIVE EVIDENCE OF THE OFFICIAL BOUNDARY AND OF THE OCCUPATION BOUNDARY ALSO, TO SUCH AN EXTENT THAT NO OTHER EVIDENCE OF THE USE BOUNDARY CAN BE OFFERED OR RECEIVED IN A COURT OF EQUITY.

It is apparent that the State courts overruled this contention of the plaintiff in error on the ground that the law of Congress made the survey void and no evidence at all of the use boundary of D street at the time of the entry of the townsite. The survey was made to be evidence; it was made to be the only and exclusive evidence after the acceptance of deeds according to it. If this is not so, then there could be no evidence made which would exclude the parol evidence at all, and it could be offered long after the mayor-trustee who confirmed the title was dead, and the whole townsite thrown into confusion. The establishment of boundaries by parol testimony is uncertain at most, and it is the policy of the law to substitute therefor the very best written evidence.

SECOND.

The defendants in error mistake the foundation of the rights of the plaintiff in error. He never claimed that his rights came from the official survey; he has always claimed, and does so now, that they are derived from the law of Congress upon the entry of the townsite, and he has only claimed that the official survey and confirmation thereon are the only and exclusive evidence of these rights under the laws of Congress, and that the official survey and confirmation are such evidence because valid under the law of Congress. The State courts held that they are not the only and exclusive evidence of his rights under the law of Congress, because the law of Congress made the survey and confirmation invalid and void and the rights of the plaintiff in error and of the defendants in error could be proven by parol testimony. Here is the distinction and it is marked: THE SURVEY AND CONFIRMATION MUST BE CONSIDERED AS EVIDENCE OF THE RIGHTS OF THE PARTIES HERETO UNDER THE LAWS OF CONGRESS, WHICH VESTED BY OCCUPATION AT THE TIME OF THE ENTRY OF THE TOWNSITE, and it is seen at once that it is only the legal effect and force of the confirmation under the laws of Congress, as well as of the survey, which is before the court.

If this evidence has the legal force and effect which the plaintiff in error claims it has by the law of Congress, a great wrong has been done to him by the courts of the State in holding that the survey and confirmation are void because the mayor-trustee and his surveyor had no power or authority to make such evidence, such survey, and such confirmation.

THE CONSTRUCTION OF THE LAW OF CONGRESS IS INVOLVED, AND THAT IS NOT A QUESTION OF FACT.

It must be remembered that the predecessor of the plaintiff in error was a townsite occupant, and as such received a deed from the mayor-trustee upon the official survey, and that therefore the plaintiff in error derives his title to his lot from the laws of Congress, and also derives his right in D street from the laws of Congress.

It is hoped that the defendants in error will not make the mistake of asserting again that the plaintiff in error claims his right by reason of the official survey of D street. The plaintiff in error claims that the official survey of D street, of the lots in the block, of the block, and the confirmation of title thereon are conclusive and exclusive evidence of his rights under the laws of Congress as the successor of a townsite occupant, and that no parol evidence of these rights can be received in a court of equity in this case.

THIRD.

The estoppel considered by the courts was the estoppel urged by the plaintiff in error, that the defendants in error could not now attack the survey and the confirmation thereon, and the courts held that because of possession which they attempt to show relates back to the possession at the time of the townsite entry, the defendants in error were not estopped to assert their equitable title under the laws of Congress, though to do so conflicted with the equitable title of the plaintiff in error as confirmed upon the official survey, and that defendants in error could now assert such equitable title notwithstanding the official survey and confirmation in 1874 and 1875. This holding involved a construction of the law of Congress and the validity of the territorial regulations for the administration of the trust, and required the State courts to hold that mere possession after the administration of the trust kept alive the equities under the laws of Congress, and that a survey is immaterial, because private rights under the laws of Congress in officially surveyed and confirmed streets can be kept alive by mere possession, without confirmation as private property to the claimants, and that such property would forever remain private property, since the survey and confirmation under the laws of Congress are not exclusive and the only evidence of the equitable rights which vested under the laws of Congress at the time of the townsite entry. The acts of the city of Lewiston could not

change the legal effect and force of the official survey and confirmation as evidence. But two city engineers surveyed block 24 and found the line to be at the north end of the brick building of the plaintiff in error, and this does not look like the city of Lewiston ever conceded that the defendants in error were not upon D street with their buildings (Record, pages 51 to 59, pages 59 to 63, and their maps on pages 54 and 60).

The defendants in error should not attempt to hold that the State courts decided upon an estoppel which was invoked against the plaintiff in error, for such is not correct. The plaintiff in error claimed no rights because of ancient lights, and there could be no decision against him upon something he never claimed.

Fourth.

The defendants in error state that the decision against the plaintiff in error rests upon State statutes of limitations. This is incorrect. No such statutes were considered, referred to, or pleaded. No reference in the answer to the statutes set out in the brief can be found, and none in the opinion of the Supreme Court of Idaho. Our law requires statutes of limitation to be pleaded, as follows:

"In pleading the statutes of limitation it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provision of section — (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the code of civil procedure."

Section 4213, R. S. of Idaho, 1887.

This section has been in force ever since 1887, and it has been held by our Supreme Court that the statute of limitations are pleaded by reference to the sections as required by the statute.

Kelly *vs.* Leachman, 3 Idaho, 629-635.

So it is plain that the only object the pleader had was to show that the equitable title vested under the laws of Congress, and that continued possession kept it alive, so that it could now be asserted against the plaintiff in error in impeachment of the official survey and confirmation of title thereon.

There was never any thought of claiming that a title in fee-simple was acquired by adverse possession under the statutes of Idaho. Such a title can never be acquired by the maintenance of a public nuisance in a street, because the nuisance never becomes lawful and always remains unlawful; so the defendants in error had to prove a lawful possession from the beginning to the end of the possession; hence they attempt to attach a title to the law of Congress by parol evidence after their predecessors, who were townsite occupants, accepted confirmation upon the official survey, which did not give to them the property now claimed as private property, but gave it to the city as public property, which survey has now become the exclusive evidence of the extent of the boundaries of the occupation as private property at the time of the entry of the townsite, because upon it title has been confirmed to the city and to the occupants.

Fifth.

To demonstrate that there is nothing but a Federal question presented by the record, the court is specifically referred to pages 30 to 44 of the brief on the merits and the authority there cited, wherein the nature of the Congressional grants to Lewiston and to the townsite occupants and the purpose of a survey and confirmation of these various grants are considered, and wherein it is established that the survey is the same as any official survey of a floating grant whose boundaries are only marked by occupation, and which occupation must be conclusively fastened to a definite and certain portion of the earth's surface. The mayor-trustee had authority, derived from the laws of Congress, to fix and

fasten the grant to Lewiston to certain and definite parcels of the earth's surface, as well as to also fasten the grants to each of the predecessors of the parties to this action to certain and definite parts of the earth's surface, so that there could be no floating of them after confirmation by moving occupations and by proving occupations by parol testimony THIS CONCLUSIVELY PROVES THAT NOTHING BUT A FEDERAL QUESTION IS PRESENTED BY THE RECORD, AND THAT THE STATE COURTS HAVE DENIED THE AUTHORITY OF THE MAYOR-TRUSTEE UNDER THE LAWS OF CONGRESS.

SIXTH.

The courts of the State overthrew the survey and the confirmation and permitted the defendants in error to prove that they had any equitable title under the law of Congress to the land they claim, which the plaintiff in error claims was a violation of rather than permitted by the Federal law. The courts also, it is respectfully submitted, nullified by their opinions the regulations of the Territory, for they provide for confirmation in no other way than upon and according to an official survey. The courts likewise nullified the official survey and confirmation thereon, and for all practical purposes rendered ineffectual the Federal townsite laws. THUS THE STATE COURTS DECIDED AGAINST THE TITLE WHICH THE PLAINTIFF IN ERROR DIRECTLY DERIVED FROM THE UNITED STATES by overthrowing the survey and confirmation as being in violation of the townsite laws of Congress.

The authorities cited in our brief on the merits show the jurisdiction of the court and as to how the record raises the Federal question, and we respectfully request a consideration of the brief on the merits in considering this motion, as that brief goes more fully into the question presented here.

Respectfully submitted,

H. WINSHIP WHEATLEY,
Attorney for Plaintiff in Error.

BEN. F. TWEEDY,
Of Counsel.

Office Supreme Court, U. S.
FILED.
DEC 7 1908
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. [redacted]. 21.

MATHEW SCULLY, PLAINTIFF IN ERROR,

vs.

LOUISE SQUIRES, JOHN M. FIX, AND JOHN Q. MOXLEY, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF IDAHO.

BRIEF OF PLAINTIFF IN ERROR.

H. WINSHIP WHEATLEY,
Attorney for Plaintiff in Error.

BEN F. TWEEDY,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 492.

MATHEW SCULLY, PLAINTIFF IN ERROR,

vs.

LOUISE SQUIRES, JOHN M. FIX, AND JOHN Q. MOXLEY, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF IDAHO.

BRIEF OF PLAINTIFF IN ERROR.

Statement of Facts of the Case.

The action was commenced in the Second Judicial District of the State of Idaho for Nez Perces County, in the district court, by the plaintiff in error against the defendants in error to enjoin them from maintaining a public and private nuisance upon D street in the city of Lewiston, Idaho. Lewiston, Idaho, is upon a Government townsite, and was entered, as such, in trust for the inhabitants thereof. It was surveyed and platted and deeds, according to the survey and plat, executed to the beneficiaries and accepted by them. D street was surveyed and platted as one of the streets upon the original townsite. The plaintiff in error owns

lot 6, in block 24, of the original survey and plat. He erected a three-story brick upon his lot at a cost of several thousand dollars, and the city, by its engineer, gave him the south line of D street, according to the original survey and plat of the townsite, and he extended the north end of his brick building to the said official south side of the said D street. The defendants, in erecting brick buildings upon lots 5, 4, 3, and 2, in block 24, aforesaid, passed beyond the official surveyed line of D street a distance of over four feet, leaving the building of the plaintiff in error in a hole, depriving him of the appurtenant rights belonging to his lot 6, which vested in his predecessor by virtue of the townsite laws of Congress, to wit, section 2387 of the Revised Statutes of the United States, as defined and set forth in the case of Ashby *vs.* Hall, 119 U. S., 526. The defendants in error claim the right to erect their brick buildings where they have under and by virtue of the said section 2387 of the Revised Statutes of the United States on account of an equitable title vesting under the said townsite laws, and that the official survey and plat are absolutely void and of no effect or force as against them, and that they have a right in this action to establish by parol testimony, under the townsite laws of Congress, that the official survey of D street, an existing street at the time of the entry of the townsite, is incorrect and cut off some of the private property of their predecessors, who accepted deeds from the trustee upon the official survey of D street and block 24 (Transcript, pp. 1 to 17, inclusive, complaint and answer).

The State courts heard parol testimony over the objection of the plaintiff in error and fixed the south line of D street under the laws of Congress at the north end of the buildings of the defendants in error, and held that they owned the property as beneficiaries under the laws of Congress, and that the official survey and plat were void as to the part of D street claimed by the defendants in error, and that the plaintiff in error had no rights in and over the same as a part of

D street appurtenant under the laws of Congress to his said lot 6, in said block 24, and therefore no interest sufficient to entitle him to maintain the action, and consequently no property rights at all under the aforesaid section 2387 of the Revised Statutes of the United States (Transcript, pp. 17 to 23 and 117 to 131, inclusive).

The predecessors of the parties to this action applied for deeds as townsite occupants and received deeds in confirmation of their equitable rights under the townsite laws of Congress, upon and according to the official survey and plat, more than thirty years ago, in which deeds not one inch of the ground in D street now claimed by the defendants in error is described at all, inasmuch as each deed refers to the original survey and is made upon such survey (Transcript, pp. 29 to 44, inclusive, being the deeds pp. 78, 81, being applications for lots 3 and 2).

There are no applications in the record for lots 6, 5, and 4 of block 24. As to what these deeds and applications describe is a question of law. They refer to the official survey, and the field notes of the official survey determine the description of the deeds and the applications. The field notes of the survey of D street, of block 24 and the lots therein, do not describe the land now claimed by the defendants in error, save only as a part and parcel of D street (Transcript, pp. 53, 54, inclusive).

The black line of the map between pages 54 and 55 shows the official south line of D street, and the red line shows the obstruction of the street north of lots 5, 4, 3, and 2 in the block. The defendants in error claim that they own the land between the red and black lines under and by virtue of settlement and occupation under the townsite laws of Congress, and the plaintiff in error claims that this land between the north boundary of lots 5, 4, 3, and 2 and the red line is a part and parcel of D street under and by virtue of the laws of Congress, the said street existing at the time of the entry of the townsite. The north end of the building of the plaintiff in error on lot 6 is at and upon the black line.

which is the official south line of D street as ascertained and established by the mayor-trustee. There is no dispute as to the north end of the building on lot 6 being at and upon the south line of D street as officially ascertained and established, but the controversy arises over the validity of the said survey, ascertainment and establishment, of the said official south line of D street by the mayor-trustee, the defendants in error claiming the land between the red and black lines by virtue of settlement and occupation, notwithstanding the official survey and plat and notwithstanding the acceptance of deeds upon the official survey wherein the said land between the red line and the black line is not described for the reason that such land is surveyed as a part and parcel of D street and could not be within the description of any deed.

On the tenth day of April, 1875, the United States conveyed the townsite to Henry W. Stanton (Transcript, pp. 26, 27).

On the official plat, between the pages 28 and 29, the following appears, to wit: "From field notes of official survey of Aug., 1874," and other evidence in the record shows that the official survey was made in 1874, which fact is not disputed. On the same map, below the foregoing quotation, appears the following, to wit: "Approved June 22d, 1875. Henry W. Stanton, mayor-trustee." So the official survey was made when and while the legal title was yet in the United States. The application to enter the townsite was filed in the Lewiston land office by Hon. Levi Ankney on the 21st of November, 1871.

The plaintiff in error asserts that there is no evidence in the record of possession by any one on November 21st, 1871, of the land or any part of it between the north end of lots 5, 4, and 3 of block 24, and red line on map between pages 54 and 55, and map between pages 28 and 29. Lot 6, in block 24, was then and there possessed and occupied by James McGrane, to whom the mayor-trustee conveyed the

said lot and who is the predecessor of the plaintiff in error (Transcript, pp. 35, 36, 87, 88, and 89).

James McGrane got lot 6, now called Scully block, in 1870, which is undisputed (Transcript, p. 87). SO IT IS UNDISPUTED AS TO JAMES MCGRANE, THE PREDECESSOR OF THE PLAINTIFF IN ERROR, BEING A BENEFICIARY UNDER THE TOWNSITE LAWS OF CONGRESS, AND THEREFORE THE OWNER, AS SUCH BENEFICIARY, OF ALL EQUITABLE RIGHTS VESTED BY THE LAWS OF CONGRESS UPON THE FILING OF THE APPLICATION TO ENTER THE LEWISTON TOWNSITE.

Evidence introduced to prove occupancy of that part of D street claimed by the defendants in error between the black and red lines of the map between pages 54 and 55 of the Transcript was admitted over the objection of the plaintiff in error, the grounds of the objection being stated usually as that the evidence was incompetent and immaterial and that the official survey could not be disputed by parol testimony (Transcript, pp. 49, 57, 58, 75, 77, 80, 83, 84, 97, 100).

And the objections to the introduction of evidence tending to establish another and different line of D street than that established by the official survey were again presented to the court in the motion for a new trial, as well as the point that the official survey was conclusive and unimpeachable, and a line of user immaterial against the survey and official ascertainment and establishment of the lines of D street (Transcript, pp. 106 to 112, inclusive).

It is assigned that the decision is against law (Transcript, p. 112, 27th assignment).

The State Supreme Court, in its decision, in construing section 2387 of the Revised Statutes of the United States, held that the mayor-trustee had no authority or power to ascertain and establish the boundaries of D street as he did, and that his act in so ascertaining and establishing them was evidence of nothing whatever and binding upon no person, although the predecessors of the parties to this action received and accepted from him their confirmation of all their

equitable rights under section 2387 aforesaid without requiring a correction of the official survey, if it was incorrect; and, further, the State Supreme Court held, in effect, that under the said section 2387 of the Revised Statutes of the United States it had the power and authority upon parol evidence to confirm to the defendants in error the land in D street, which they claim notwithstanding the confirmation of it to the city with the consent of their predecessors more than thirty years before, and thereby held that the prior confirmation of equitable rights under the said section 2387 by the mayor-trustee could be ignored and the trust as to the part in the street, as the court held, could be executed upon the uncertain, insufficient evidence in the record tending, as the State courts thought, to establish that the predecessors of the parties to this action, if they so wished, might have compelled the mayor-trustee to confirm unto them the land between the black and red lines as they appear upon the aforesaid maps (Transcript, pp. 117 to 131, inclusive).

The deed executed by the mayor-trustee to James McGrane of lot 6, in block 24, of the original survey on the 3d of April, 1876, confirmed to him all rights under Congressional law which vested upon the entry of the townsite and conclusively establishes that he was an occupant of a portion of the townsite and applied for confirmation of his rights as such, and that his rights were confirmed to him according to their ascertainment by the mayor-trustee and according to the official survey of D street (Transcript, pp. 37 and 38).

The titles vesting under the laws of Congress were confirmed to Bunker & Squiers on the 27th of September, 1875, by the mayor-trustee, and there is nothing in the record to establish that these predecessors ever conveyed to Mrs. Squiers the ground in D Street now claimed by her. The equitable titles vesting under the laws of Congress upon the entry of the townsite were confirmed to Conrad Wintsch on the 20th of September, 1875, and to George Glass on the 11th of September, 1875, and there is nothing in the record

to establish that these men, who are the predecessors of John M. Fix, ever conveyed the land in D street to any one, which land is now claimed by the defendant in error, John M. Fix. The equitable titles vesting under the laws of Congress upon the entry of the townsite were confirmed to the defendant in error, John Q. Moxley, on the 23d of September, 1875 (Transcript, pp. 39, 40, 41, 42, 43, 44, 31, 32).

The confirmation to George Glass does not seem to be acknowledged until the 8th of April, 1878. In the deed to John Q. Moxley the area is given as 1,136 square feet, being the same as the area of the official survey (Transcript, p. 54); in the deed to James McGrane the area is given as 1,506 square feet, the same as the area in the official survey (Transcript, p. 54); in the deed to Conrad Wintsch the area is given as 1,162 square feet, being the same as the area given in the official survey (Transcript, p. 54); in the deed to George Glass the area is given as 1,062 square feet, being less than the official area of the survey (Transcript, p. 54); but on the 14th of October, 1875, the mayor-trustee confirmed to James Kearney a part of lot 5, stating the area to be 498 square feet, which makes the lot equal 1,560 square feet when it only has an area of 1,508 square feet; but no court will hold that more land than that contained in the official lot was confirmed to these parties. In the deed to Bunker & Squier the area is given as 1,250 square feet, when the official area is only 1,131 square feet, and it must be admitted that the mayor-trustee seems to have attempted to convey to them an addition to lot 2, attempted to confirm more than the official lot to them, and the evidence shows that they occupied more than the official lot at the time of the entry of the townsite, but the description of the addition is 476 feet by 25 feet, and nothing is stated so that it can be known where the addition is, and therefore the mayor-trustee only confirmed to them the official lot of the official survey. There is no field notes of any addition to lot 2 or to any of the lots, and no monuments were found, upon the

ground, giving any evidence of an amendment of the official survey, and consequently the mayor-trustee could not legally confirm to them a part of D street.

The defendants in error applied to the city to have block 24 surveyed, and the city engineer, upon the command of the city, did survey the block, and he gave them the curb-line, the same curb-line which had been given to the plaintiff in error, and he would have given them the same building line which had been given to the plaintiff in error by another city engineer, Edson Briggs, but they did not want this building line and Mr. Wrighter did not give it to them. The map made by Mr. Wrighter will be found between pages 60 and 61 of the Transcript. The outer red line indicates the curb-line and the inner red line the obstruction of D street by the old buildings which were burned, and the black line indicates the official line of D street, being the same as the black line of the map on page 54 made by Edson Briggs at the time he surveyed the block and gave the plaintiff in error his building line (Transcript, pp. 59 to 62, inclusive). And Mr. Wrighter attempted to state that the difficulty in making block 24 close according to the calls would make a difference in the south line of D street, but he had to acknowledge that it would not (Transcript, pp. 62, 63, 61).

After the fire abated the nuisance maintained by the old frame shacks, the defendants in error commenced erecting brick buildings, and, it appearing to the plaintiff in error that they intended to appropriate a part of D street, he, before they expended any money, told them that he would stop them if there was any law to prevent them from building upon the street (Transcript, pp. 67, 68).

The plaintiff in error was given his building line by the city upon the official survey of the mayor-trustee, and this is the reason he constructed his brick as he did, ending the north end thereof at the official south line of D street. John M. Fix wanted him to go before the council of the ctiy of Lewiston and get permission to extend the building upon

the street, basing the application upon the fact that the city would get more revenue, but the plaintiff in error refused to ask permission to build upon D street (Transcript, pp. 46, 47, 55).

Mr. Briggs states that he never saw all the red lines on map between pages 28 and 29 and positively says that there was no red lines on the map over his property when he saw the map, so that there has been some tampering with the official map. The plats filed in the recorder's office, of which the map between pages 28 and 29 is a copy, were abused and never kept in a volume of record and a great many have been copied, and the introduction of the map was objected to on the ground of alterations (Transcript, pp. 51, 53, 27, 28).

There are no field notes of any amendment of the original survey and no marking upon the ground to show any change in the official survey, and so both engineers ascertained by survey that the south line of D street was at the north end of the brick building of the plaintiff in error, and that the buildings of the defendants in error encroach upon D street as ascertained and officially established by the mayor-trustee by his survey of 1874.

The defendant in error, John M. Fix, admits that he is building upon four feet for which he has no deed, and that the city will have to vacate the part of the street upon which he is building to him, and that there has been uncertainty as to the south line of D street, some saying one thing and others saying another thing (Transcript, pp. 71, 72, 95).

There was a plat by which the people went before the townsite was entered (Transcript, p. 83). The plat is found between pages 82 and 83 of the Transcript.

The attention of the court is called to the fact that there is no scale upon this plat, but it appears upon its face that the streets, before the entry of the townsite, were of uniform width throughout their entire length, and that there was no street jumping or zigzags permitted. D street upon this plat is D street upon the offiical plat, and the same as the D street

established by the mayor-trustee. It is as wide at the west end as at the east end and is of uniform width throughout its entire length. It is not narrower north of block 15, which is block 24 of the official survey, than at any other place; but, turning to the official plat, the red lines make the street narrower north of block 24 than at any other place.

The State Supreme Court states that lots fifty feet long from north to south had been occupied for 45 years, and it is a fact that there is no evidence in the record upon which such a statement can be based. On page 83 of Transcript there will be found a colloquy between the attorney for the defendants in error and the trial court, wherein the attorney states that the lots were originally fifty feet; but this is not evidence. On the plat by which the people went before the entry, the lots run east and west, and there were no lots from the north to the south at all, and there is nothing by which the size of these lots can be ascertained.

The act approved January 8, 1873, for the regulation of the execution of the Lewiston townsite by the mayor-trustee is in words and figures following, to wit:

"SECTION 1. The mayor of the city of Lewiston, Nez Perces county, Idaho Territory, who by authority of a patent issued by the United States Government, is trustee to execute the trust in behalf of the inhabitants of the said city of Lewiston, in relation to the land described in the said patent, and by virtue of the United States Statutes, entitled: 'An act for the relief of the inhabitants of cities and towns upon the public lands,' approved March 2d, 1867, is hereby authorized, directed and required under the provisions and limitations hereinafter specified and set forth, to make and deliver to the *bona fide* occupants of such portions of the said land described in said patent from the Government of the United States, who may be entitled thereto good and sufficient deeds of conveyance in fee-simple, according to their respective interests, and for that purpose he shall, within twenty days after the receipt by him, the said mayor

and trustee of the said patent from the General Government, give notice thereof in a newspaper published in said city, or if there be none there at the time, in one nearest the locality and of general circulation, and requiring all persons claiming land within the said designated tract of land, and described in said patent to present their respective claims therefor in writing, to said mayor-trustee, at his office in said city. The said mayor-trustee shall at the same time also cause to be made and filed in his office by a competent person, a plat of the said land divided into blocks and lots to such an extent as may be deemed requisite by said mayor-trustee, and into divisions of acres and parts of acres as may be deemed requisite by the said mayor-trustee, and at his discretion, the exterior lines of the remaining part of said land shall be run, marked, and platted on said plat; which shall be approved by said mayor-trustee, and the said mayor-trustee shall cause immediately thereafter, the said plat to be recorded in the records of Nez Perces county, Idaho Territory, in accordance with the law or laws governing the record of deeds of conveyance of real estate in said Idaho Territory.

"SECTION 2. That the streets, lanes, alleys and other rights of way, which may be in common use at the time of the enforcement of this act, within the said city, over the land described in the aforesaid patent, are hereby declared to be public highways, for the use and benefit of the inhabitants of said city in common, *and that the survey and platting of the said land into blocks and lots, acres or parts of same, shall conform thereto.* That the survey and platting of the land described in the aforesaid patent for said city of Lewiston, shall be so as to divide the blocks into lots, to be, whenever practicable, each fifty feet in width and one hundred feet in depth, and the fractional block or blocks, lot or lots, acre or acres, shall be so arranged and adjusted as to conform to the condition of the improvements and occupation at the time of the enforcement of this act. *That where streets, alleys, roads, or other rights of way have been obtained, may have been reserved or claimed by the inhabitants in common of the said city, as streets, alleys, roads, or other rights of way, and may be occupied at the time of the enforcement of this act by individuals, are hereby declared to be public highways for the purposes, use and benefit of the inhabitants of said city of Lewiston, in common.*

"SECTION 3. *The occupants of the land included and de-*

scribed in said patent, may at any time within sixty days after the publication of said notice, and the filing of the said plat of survey, make their respective applications for title to such portions of the land described in the aforesaid patent as may be claimed by them, which applications shall state that such claimant or claimants are bona fide occupants of the described portion of the land and the lot or lots, and fraction of lot or lots, block or blocks, and fraction of block or blocks, acre or acres, or fraction of acre or acres, included in each claim by him, her or them, and said application shall state and specify the character and in what said occupancy consists, which shall be either actual residence thereon, enclosure or some permanent improvement on some portion of the lot or lots, block or blocks, acre or acres, or the fractions of the same lying contiguous, claimed by he, she or them, and shall particularly designate and describe such land, and the improvements thereon in said application, *in accordance with the plat of the said land,* as recorded in the county recorder's office, as hereinbefore set forth; said applications shall be in writing and verified by the oath or affirmation of the applicant, or by some person on his, her, or their behalf, in all cases, and verification shall be in substance as follows, viz: Idaho Territory, Nez Perces County, ss: On this the (date) day of (month) A. D. 187–, I (name) do solemnly (swear or affirm) that the statements in the foregoing application to the mayor of the city of Lewiston, Idaho Territory, trustee for the inhabitants of said city, for land described and included in a patent for the same to him, said trustee, from the General Government of the United States of America, are true of my own knowledge, except as to matters therein stated on information and belief, and as to those matters (for we) believe them to be true. (Signature.) Subscribed and sworn to before me, this the (date) day of (month) A. D. 187–; which oath or affirmation must be taken before and subscribed by an officer, who is authorized by the laws of Idaho Territory to administer the same; *Provided, that no claim shall be allowed which shall not conform to the requirements of this act, nor shall any claim be allowed for, or any conveyance made, of any portion of any street, alley, road or other right of way that has heretofore been, or by this act, is declared to be a public highway, or other land, which is included and described in the aforesaid patent, and dedicated or appropriated to public use, except*

for the benefit, the use and the purpose of the inhabitants of the said city of Lewiston, in common.

"SEC. 4. The said mayor-trustee shall receive and file, with the records of his office, each and all applications for the said land, and shall endorse, over his signature, the date received upon each and all, which application shall be free to and subject to the inspection of any and all persons who desire to do so; and shall in each and every instance, when no adverse claim is filed, and on the payment of the money hereafter provided for, after the expiration of sixty days from the date of the said filing of said application, execute a deed of conveyance in fee for the land claimed, and is undisputed, and deliver the said deed when called for, to the proper party or parties, noting the time of delivery on said deed, over his signature; and in all cases where an adverse claim to any of said land shall be presented by any claimant within the said sixty days after the same shall have been claimed as aforesaid, all proceedings for a deed of conveyance by said mayor-trustee shall be stayed, and he shall within five days after the filing of the adverse claim, deliver to such prior claimant or claimants, personally, if he, she or they be within the city, or otherwise, to his, her, or their agent in writing, a notice of such adverse claim, and no conveyance shall be made by the said mayor-trustee, until the final determination of such conflicting claim or claims by a final judgment of a court of competent jurisdiction, and it shall be the duty of such subsequent adverse claimants, to bring the same to such determination and on failure to commence proceedings for that purpose, for a period of sixty days from the time of filing of his, or her, or their adverse claim, he, she or they shall be deemed to have waived and abandoned such claim, and a deed of conveyance shall be executed and delivered to the prior claimant, the same as if no such adverse claim had been made; upon final determination of such adverse claim or claims, the successful claimant or claimants shall file with the said mayor-trustee, a certified copy under the seal of the court, of the final judgment, in his, her or their favor, and the said mayor-trustee shall execute immediately thereafter, and deliver to the proper party or parties, a deed of conveyance in accordance with said judgment.

"SEC. 5. No tenant who holds any lands within the tract included and described in the aforesaid patent, from another,

either for a term, or at will, shall be entitled to claim such land adversely to the person under whom he holds, nor shall he, she or they be entitled to a deed of conveyance therefor.

"SEC. 6. The numbering of the blocks and fraction of a block, and lots and a fraction of lot, shall bear numbers in consecutive order, in accordance to the rule adopted and prescribed by the General Government in relation to sections in townships, as near as is practicable; each fraction of block or lots to bear a whole number, and in that portion to be laid off by acres and parts of acres, as herein provided for, each such claim shall be numbered, commencing at the northeasterly angle of the said part of said survey, and in the same consecutive order as that of the blocks and lots, and also the area of such claims shall be computed in acres and hundredths of acres and noted on the aforesaid plat of survey.

"SEC. 7. That for the purpose of defraying the expenses of procuring the title to said land, townsite and incident thereto, and for the survey, platting and recording of the aforesaid plat, there shall be paid into the treasury of the said city by the claimant or claimants of the said land, on notice given by the said mayor-trustee, to the treasurer of said city, that certain and specified claim has been awarded to said claimant or claimants, the following sum of lawful money of the United States, that is, for each lot in blocks of said land, ten dollars, and in proportion thereof for each fractional lot; and for each acre, six dollars, and in proportion thereof for each fractional acre, and the said treasurer shall, over his signature, receipt at the time of receiving of said sum or sums of money, to the claimant or claimants for the amount so paid to him, designating in said receipt the purpose for which said money was paid to him, and giving the description of the said land. Upon the production of and filing with the said mayor-trustee of said treasurer's receipt, the said mayor-trustee shall, on the payment of his fees as hereinbefore provided for, execute and deliver a deed of conveyance, in fee for such land as may have been awarded to said claimant or claimants. All claims for the expense of procuring and incidental thereto, surveying, platting and recording, as hereinbefore provided for, shall be considered and allowed by the common council of the said city, and warrants on the treasury of the said city shall be issued therefor, under and by virtue of ordinance of said city

council, approved by the mayor of said city, and said warrants shall draw legal interest from the date of presentation to said treasurer of said city, who shall endorse at the time of presentation to him the fact over his signature upon said warrant or warrants, as the case may be, and make a proper note thereof in the records of his office.

"SEC. 8. The said mayor-trustee shall be entitled to demand and receive, for his own use and benefit, the sum of twenty-five cents for filing each application, or other paper required to be filed; the sum of one dollar for the giving each notice of an adverse claim required to be issued and served by him, which service shall be by copy of the original, which original shall be filed in the records of his office; and three dollars for the making, acknowledging and stamping of each deed; but no more than one deed shall be made to any applicant for any number of lots or parts thereof, or acres or parts thereof, unless required by such applicant.

"SEC. 9. *All blocks, lots, acres, or parts of the same, remaining unclaimed for a period of six months from the date of the first publication of the notice hereinbefore provided for, shall be sold by the said mayor-trustee at public auction,* to the highest bidder, for legal money, after his giving notice publicly for three weeks, either in a newspaper published in said city, or by five written notices of such sale, to be posted at different and most public places in said city; and the proceeds of said sale shall be by him paid into the said city treasury, he to receive a receipt therefor from the treasurer thereof, after deducting therefrom the actual expense incurred by said sale; and that portion of the said tract of land included and described in the aforenamed patent, and not surveyed into blocks and lots, and claims of acres and parts of acres, and of which the exterior lines are to be run and platted, shall be subject to the control and disposal of the said mayor-trustee, under and by virtue of duly enacted ordinance or ordinances of the said common council of said city.

"SEC. 10. All moneys derived from the private and public sale or disposal of said lands included in and described in the aforesaid patent from the United States, and under this act, shall be paid in to the treasury of the said city of Lewiston, Nez Perces county, Idaho Territory, and shall be applied and appropriated, paid out and expended, by the treasurer of said city, under and by virtue of ordinance or ordinances of said city, duly passed and approved, and in which preference

shall be given to the warrants authorized and issued by the said city authorities on the treasury of said city prior to the passage of this act, and for the purpose of obtaining a perfect title under the laws of the United States and in trust for the inhabitants of the aforesaid city of Lewiston, next subsequent thereto, such appropriations and warrants as may be authorized by the said common council upon the fund to be set apart by the treasurer for the disposal of the land under and by authority of this act, and the residue, if any, shall be expended under the ordinances of the said common council of the city of Lewiston, aforesaid.

"SEC. 11. This act shall be in force and take effect from and immediately after the reception of the aforenamed patent from the General Government of the United States of America by the said mayor of the city of Lewiston, and trustee for the inhabitants thereof, and its passage by the legislature of Idaho Territory, and the approval by the Governor of the said Territory."

Specifications of Error.

1. There is nothing in the foregoing regulations which makes the act of the mayor-trustee herein mentioned void, and so, therefore, when the State Supreme Court, in its opinion, held that the acts were void because prohibited by the townsite laws of Congress, it committed error. The plaintiff in error submits that the mayor-trustee had under and by virtue of federal laws, the power and the authority to confirm the equitable title, as he did, and that such confirmation by the granting of a deed in conformity with the statute of the Territory was valid and binding between all parties.

2. The trial court and the Supreme Court of the State both erred in holding that the court had the right in the trial of the case to go back of the deeds to the parties to determine what the deeds should have been made to cover. In other words, both the trial court and the appellate court of the State erred in holding that the court had the right in

1907 to destroy what had been done for the benefit of the townsite occupants upon their own application for confirmation of their equitable rights under the laws of Congress, and in holding to the construction of section 2387, Revised Statutes of the United States, so as to destroy the force and effect of everything done by the mayor-trustee in confirmation of the equitable titles of the beneficaries under said section.

3. The trial court erred in admitting evidence to show that the defendants in error had any other title than that shown by the deeds obtained by their predecessors in title from the mayor-trustee under the townsite laws, and in admitting evidence to show any changes in the original lines of D street, as shown by the original True survey.

4. That the Supreme Court of the State and the trial court erred in adjudging and decreeing that the plaintiff in error had and owned no private rights, no easement, or any thing in that part of D street claimed by the defendants in error, which vested under and by virtue of the townsite laws of the United States, especially section 2387, Revised Statutes U. S., and under the regulations for the administration of the trust adopted by the legislature of the Territory of Idaho (Session Laws 1872-'73, page 16), and further erred in adjudging and deciding that the official survey of D street made by the mayor-trustee in 1874 was not conclusive and exclusive evidence in 1905 in this cause of the boundaries of D street, consisting of the boundaries of the property of the defendants in error.

5. The courts below further erred in adjudging and deciding, upon evidence tending to contradict the aforesaid survey, that the boundary line of D street on the south side thereof was to the north of said official boundary line, and that the trust, as between the predecessors in title of the de-

fendants in error who accepted deeds from the mayor-trustee, was not completely executed, terminated, and closed by and with the consent of said predecessors.

6. The Supreme Court of the State and the trial court both erred in adjudging and deciding that the trust imposed upon the mayor-trustee by section 2387, Revised Statutes of the United States, and executed under the laws of the Territory, as herein mentioned, could be reopened, re-examined, and re-executed in 1905, many years after the expiration of the limitation created by the laws of the Territory for the approval of property rights and the granting of deeds to those previously holding equitable titles.

7. The courts below erred in reopening, re-executing, and re-administering said trust and in attempting to execute and enforce the said trust otherwise than according to said official survey accepted by the predecessors of the defendants in error who applied for and received deeds in complete execution of the trust on the part of the mayor-trustee.

8. The courts below erred in adjudging and holding that, as the mayor-trustee, under the acts referred to, did not have power, against the will and wishes of said beneficiaries or the predecessors in title of the defendants in error, to cut off four feet of D street, therefore the said survey, as to that cut-off of the street, if such was the fact, was and is absolutely void, inasmuch as the predecessors of the defendants in error had their title confirmed upon and according to said survey, and there was nothing cut off into the street without their consent and approval.

9. The courts below erred in not enforcing the limitations of sixty days mentioned in the laws of the Territory, these laws providing, as mentioned hereinbefore, for a limitation of sixty days for all parties to have their title con-

firmed, and as the predecessors of the defendants in error did not act within this limitation, they were forever barred.

10. The courts below further erred in adjudging and deciding that the defendants in error had and owned the equitable title in and to the said land lying and being in D street, and in holding that under a proper construction of the aforesaid townsite laws of Congress and the regulations of the Territory of Idaho herein mentioned made it the duties of the courts to repudiate the official survey, and to re-examine, reopen, and again enforce a trust under the townsite laws, as between the trustee and the beneficiaries of the rights, just the same as if said trust had not been administered, executed, and closed under the regulations for its administration, with the consent of the beneficiaries, expressed or implied, provided by the territorial legislation.

11. The courts below further erred in deciding that the predecessors of the defendants in error, after they had accepted deeds upon the said official survey in confirmation of their title under the townsite laws of Congress, were in a position and had the right to assert title to a parcel of land lying and being in D street of the city of Lewiston, and in holding that the courts could go behind previous land records in the case to determine the proper boundaries of the lots of the defendants in error.

12. The courts below erred in a failure to hold that the townsite laws of Congress, in conjunction with the laws of the Territory, created a basis for equitable title upon which legal title might be obtained by compliance with certain regulations laid down by the federal laws and territorial laws as herein mentioned. In other words, it is submitted that the State courts should have held that legal title of all of the land in the then Territory of Idaho existed in the United States, and that by federal statutes individuals who

had more or less equitable rights might obtain legal titles from the United States by compliance with certain regulations. Where these regulations were complied with the United States was legally bound to convey a proper legal title, and in the event the mayor-trustee had declined to convey a proper legal title upon the regulations being complied with by an individual holding a previously equitable title, then the ministerial duty of the mayor-trustee could have been enforced at that time and the courts would have compelled the mayor-trustee in a proper action to have made a conveyance to said party. The courts below should have held that where one previously holding an equitable title had failed to comply with the restrictions and limitations of the federal and territorial laws for the changing of an equitable title to a legal title and had allowed the period of limitations specified by those acts to expire, then it was not within the province of the court some years afterwards to re-examine the acts of the mayor-trustee or to undertake to determine what the mayor-trustee should have done or what any other officer should have done at that time, as such would have endangered all titles to real property growing out of such laws.

It is respectfully submitted that, as the courts below held the opposite view to that stated in this assignment of error, they erred.

ARGUMENT.

As a number of the assignments of error speak for themselves, and the plaintiff in error is contented with their logic without argument other than as stated, he has not in this part treated the assignments of error in the order in which they are stated. It has been his attempt to state the accounts as they present themselves to his mind in as logical a manner as possible.

The Federal Questions Presented.

The legal title after the entry and until the patent to the mayor-trustee was in the United States, and during such time the equitable title was in the city and the townsite occupants occupying at the date of the entry.

Hussey *vs.* Smith (U. S.), 25 L. Ed., 314; 99 U. S., 9 Otto, 20-23.

Ashby *vs.* Hall (U. S.), 30 L. Ed., 469; 119 U. S., 526.

Cofield *vs.* McClellan (U. S.), 16 Wall., 331.

Stringfellow *vs.* Cain (U. S.), 25 L. Ed., 421; 9 Otto, 610.

And because the equitable title vested upon the entry in the townsite occupant, then occupying, the laws of Congress gave him a right to have his equitable title confirmed by a deed from the trustee.

Hussey *vs.* Smith, *supra.*

And the title must be confirmed to such townsite occupant according to the boundaries of his occupation and the boundaries of existing streets, in order that he may obtain legal and conclusive proof of his title, both legal and equitable.

Ashby *vs.* Hall, *supra.*

Cofield *vs.* McClellan, *supra.*

And for the purpose of this confirmation of title as required by the laws of Congress, the mayor-trustee has authority and power to ascertain the nature and extent of the rights by establishing the boundaries of streets and private occupations, as occupied at the time of the entry of the townsite, in order to give the legal and competent evidence of such nature and extent to the city and to the townsite occupant.

Ashby *vs.* Hall, *supra.*
Hussey *vs.* Smith, *supra.*
Cofield *vs.* McClellan, *supra.*

"If the fact assumed was true, that the plans and descriptions had been confirmed, and boundary given to the title according to them by the United States, then the decision would be opposed to the confirmation, and jurisdiction exists in this court."

In Hussman *vs.* Durham (U. S.), 41 L. Ed., 664, it is said:

"A motion to dismiss was submitted by the defendant in error, but as the Supreme Court of the State held that the equitable title apparently conveyed by the proceedings in the United States land office in 1858 was of no effect, and the tax titles based thereon of no validity, it is apparent that a right claimed under the authority of the United States was denied, and therefore this court has jurisdiction."

In the case of Chever *vs.* Horner (U. S.), 35 L. Ed., 959, the subject of a federal question was before the court. But I think that case and the case of Scully *vs.* Squiers are not parallel, because the question determined by the State courts was limited entirely to the local laws of the Territory relating to the Denver townsite and the matter of the proceedings not being a proper execution of the trust under the laws of Congress was not involved, while here the title of plaintiff in error is knocked out because the proceedings are in conflict with the laws of Congress, because the authority of the mayor-

trustee under the laws of Congress to survey and plat the street, as he did, is questioned and the courts decided against the authority; the State court decided that the survey and plat was of no effect, and that titles based thereupon were of no validity at all. The plaintiff claims title under the laws of Congress and under the proceedings authorized by the laws of Congress, to wit, the "disposal of the land," and the defendants in error claim the land under and by virtue of the laws of Congress, and that the mayor-trustee had no authority to survey the land as a street under the laws of Congress. The proper execution of the trust by the mayor-trustee under the laws of Congress is involved. The plaintiff in error says that the proceedings were a proper execution of the trust under the laws of Congress, and claims his title because of the authority of the trustee to survey the land as a street under the laws of Congress, and the defendants in error claim title because under the laws of Congress the trustee had no authority to survey the street; no authority to make it a street; no authority to make the land they claim a part of a street.

McDonogh *vs.* Millandon (U. S.), 11 L. Ed., 786-794.

"When, indeed, the question decided by the State court is not merely of the weight or sufficiency of the evidence to prove a fact, but of the competency and legal effect of the evidence as bearing upon a question of Federal law, the decision may be reviewed by this court."

Dower *vs.* Richards (U. S.), 38 L. Ed., 305-306; 151 U. S., 658.

Mackey *vs.* Dillon (U. S.), 11 L. Ed., 1038-1050; 4 Howard (U. S.), 419.

Almonester *vs.* Kenton (U. S.), 13 L. Ed., 21; 9 Howard, 1.

The mayor-trustee is and was the representive and officer of both the federal and territorial governments.

Anderson *vs.* Bartels (Colo.), 3 Pac. Rep., 225.

Ming *vs.* Foote (Mont.), 23 Pac., 515.

Section 2387 of the Revised Statutes of the United States (U. S. Comp. St., 1901, p. 1457) restricts the power and authority of the mayor-trustee, and section 2391 of aforesaid Revised Statutes of the United States contains the provision: "Provided, further, that any act of said trustee, not made in conformity to the rules and regulations herein alluded to shall be void."

Ming *vs.* Foote, *supra.*

Helena *vs.* Albertose (Mont.), 20 Pac., 817.

The State Supreme Court decided that the "act" of the mayor-trustee in the case at bar was void because in violation of the law of Congress, and further decided that the mayor-trustee had no power or authority to survey D street as he did survey it and no power or authority to change "the beneficiaries under this trust," and therefore no power or authority to confirm unto the city of Lewiston by his official survey the said D street as he surveyed it, and therefore no power or authority to confirm unto the predecessor, who was the occupant of the lot owned by the plaintiff in error, his rights of way, etc., in, to, and over D street as he surveyed the same.

Scully *vs.* Squier (Idaho), 90 Pac., 573.

"The appellant rests his case here on the making and approval of said plat. If private rights can be taken in that way, it is a novel proceeding and a proposition unknown to our law."

Scully *vs.* Squier, *supra,* at page 578.

The complaint on its face, the record, the objections to the introduction of evidence, the assignment or statement of the grounds upon motion for a new trial, and the assignment of error in the State Supreme Court establish that the appellant rested his case upon the authority and power under the laws of Congress of the mayor-trustee to make and approve the survey and to execute deeds thereupon,

and the acceptance of the survey by the predecessors of the plaintiff and defendants in error, making the deeds and the plat the only and conclusive evidence of the boundaries of the equitable titles which vested from the United States and which were confirmed by the United States through its officer for that purpose, the mayor-trustee. The plaintiff in error rested his case upon the confirmation by the United States of the rights of the predecessors of the parties to this action, and the State Supreme Court decided against that confirmation and held that it was void as to the city and as to the predecessor of the plaintiff in error, and therefore not conclusive, under the laws of Congress, of the rights of the parties vested by the laws of Congress, and that the laws of Congress, notwithstanding the accepted confirmation, required the confirmation to be held invalid as to the confirmation of the rights of the city to D street as surveyed and invalid as to the confirmation as to the rights of the predecessor of the plaintiff in error in and to the said street under the laws of Congress, and which rights are now owned by the plaintiff in error (Transcript, pp. 117 to 131, inclusive). The jurisdiction of the court on writ of error is abundantly established by the following cases, wherein the question of confirmation of title as well as the authority of officers of the Government of the United States are discussed as when denied being sufficient to confer jurisdiction upon the court:

Maguire *vs. Tyler* (U. S.), 17 L. Ed., 137; 1 Black (U. S.), 196.

City of Carondelet *vs.* City of St. Louis (U. S.), 17 L. Ed., 102; 1 Black (U. S.), 179.

McDonogh *vs.* Millandon, *supra.*

Mobile Transportation Co. *vs.* Mobile (U. S.), 47 L. Ed., 266; 187 U. S., 479.

Green Bay & Mississippi Canal Company *vs.* Pattern Paper Co. (U. S.), 43 L. Ed., 364; 172 U. S., 58.

Hussman *vs.* Durham (U. S.), 41 L. Ed., 664; 165 U. S., 144.

Northern Pacific R. Co. *vs.* Colburn (U. S.), 41 L. Ed., 479; 164 U. S., 383.

Shively *vs.* Bowlby (U. S.), 38 L. Ed., 331; 152 U. S., 1.

Pickering *vs.* Lomax (U. S.), 36 L. Ed., 716; 145 U. S., 310.

Anderson *vs.* Carkins (U. S.), 34 L. Ed., 273; 135 U. S., 483.

Neilson *vs.* Lagow (U. S.), 12 L. Ed., 908; 7 How. (U. S.), 772.

Chouteau *vs.* Eckhart (U. S.), 11 L. Ed., 293; 2 How. (U. S.), 334.

Lessee of Pollard's Heirs *vs.* Kieffe (U. S.), 10 L. Ed., 490; 14 Pet., 353.

Wallace *vs.* Parker (U. S.), 8 L. Ed., 543; 6 Pet., 680.

Ross *vs.* Barlard (U. S.), 7 L. Ed., 302; 1 Pet., 655.

"But no particular form of words or phrases has ever been declared necessary in which the claim of federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the State court in such manner as to bring it to the attention of that court."

Green Bay & M. Canal Co. *vs.* Pattern Paper Co., *supra.*

"And the Supreme Court will review a question, although it was not put in issue by the pleadings nor directly passed upon in the opinion, where it is apparent, both from the pleadings and the record, that the decision in the State court could not have been reached except by disposing of the federal question."

Kaukauna Water Power Co. *vs.* Green Bay, etc. Co., 178 U. S., 254; 11 Cyc., p. 936, and note 99.

The courts of the State of Idaho could not render the decision that the defendants owned under the laws of Congress the ground in the surveyed street without deciding against the confirmation of title to the city and to the plaintiff and

defendants' predecessors upon the said official survey and against the power and authority of the mayor-trustee to survey the street as he did and approve the survey and confirm titles by delivering deeds upon the official survey, and neither could the court render its said decision without holding that the deeds and the official survey were not the exclusive and only competent evidence of the rights of the parties under the laws of Congress, and neither could the State courts decide that the defendants in error owned the ground they claim without also deciding that the plaintiff in error did not own the rights of property he claimed in his complaint and in the action and exhibited upon the face of the record as appurtenant to his said lot 6, in block 24 of the survey of the original townsite, officially made by the mayor-trustee, in, upon and over D street as surveyed by authority of the laws of Congress under the regulations of the territorial legislature. It therefore is not a question of finding the line upon the earth's surface of an undisputed valid official survey wherein no federal question can possibly be involved or raised by the action, but it is a question of the validity of the confirmation of title under the laws of Congress and of the authority and power of the trustee under these same laws to confirm the title as he did.

* * * "Questions of law as distinguished from questions of fact, so far as they are necessarily involved in the judgment of a State court against the validity of an authority claimed by the defendants under the United States, should be reviewed by the Supreme Court, whether the question depend on the United States Constitution, laws, or treaties or on local law, or on principles of general jurisprudence."

11 Cyc., p. 940.

Stanley *vs.* Schwalby, 162 U. S., 255; 40 L. Ed., 960.

"But the rights under a statute of the United States were claimed by plaintiff in error, and that statute was referred to by the Supreme Judicial Court, and was an element in its

decision. * * * We therefore overrule the motion to dismiss and go to the merits."

Hammond *vs.* Whittredge, (U. S.), 51 L. Ed., 606.

The Supreme Court of Idaho referred to the statute of the United States under which the plaintiff in error in the case at bar claims his rights direct from the United States, and that statute was an element in the decision in holding that the survey of D street was void, and that deeds and survey were not conclusive evidence of the rights of the parties in this action under the said law of Congress as legal and unimpeachable conclusive evidence of the proper confirmation of the equitable rights of the city and of the predecessors of the parties to this action.

Where the State Supreme Court entertained a federal question and decided it, the record is sufficient to present the question for review.

Montana *ex rel. vs.* Rice (U. S.), 51 L. Ed., 490; 204 U. S., 289.

If the State Supreme Court entertains the federal question and decides it upon a petition for rehearing, the record presents the federal question for review.

Lavagnmo *vs.* Uhlig (U. S.), 49 L. Ed., 1119; 198 U. S., 443.

Leigh *vs.* Green (U. S.), 48 L. Ed., 623; 193 U. S., 77.

"It is contended by counsel for appellant that, at the time said plat was filed, the title to said lands was in the United States, and for that reason no dedication of said street was made, as a dedication, to be valid, must be made by the holder of the legal title. Said act of Congress, under which said city was acting, authorized the platting of said land into blocks, streets, and alleys, and the dedication of such streets to the use of the public."

Boise City *vs.* Flanagan (Idaho), 53 Pac., 453.

D street, in the city of Lewiston, was an existing street before the entry of the townsite, and upon the entry the title to it for street uses vested in the city of Lewiston as well as the private easements of townsite occupants vested then in them.

Ashby *vs.* Hall (U. S.), 30 L. Ed., 469; 119 U. S., 526.

And the laws of Congress authorized an official ascertainment of its boundaries.

Ashby *vs.* Hall, *supra.*

That official ascertainment has been set aside by the State court as unauthorized and on the grounds that under the laws of Congress the mayor-trustee could not ascertain the boundaries where he describes them in the approved official survey, and that though the occupants received their deeds upon the survey and thereby accepted it as a legal exercise of authority vested in the mayor-trustee by the laws of Congress, they were at liberty in 1905 to overthrow the official survey by parol testimony, on the ground that simple possession under the laws of Congress preserved an equitable title which could not be taken from them by the mayor-trustee, and that all evidence of the equitable rights under the laws of Congress did not, therefore, merge in their deeds and in the official survey as the only and conclusive evidence. The State court not only decided against the authority of the mayor-trustee under the laws of Congress, but decided as to the legal effect of the deeds accepted by the predecessors of the parties to this action and the official survey, which was accepted and approved by the acceptance of said deeds as evidence of the equitable rights of all the parties to this action, which vested in their predecessors by force of the townsite laws of Congress.

Again, the evidence shows that the grantee of the mayor-trustee was a townsite occupant of lot 6 in block 24 of the original townsite survey and was a beneficiary of the trust

under the aforesaid townsite laws of Congress, and as such claimed his rights in D street, and the record also shows that the defendants in error claimed to be beneficiaries under the laws of Congress and as such that they owned the land in dispute. The claim of each depends upon the construction of the laws of Congress, and the plaintiff in error sets forth that the equitable right under the said laws of Congress vests upon a condition subsequent, which is that the owner of the equity must within a reasonable time have his right confirmed by the trustee upon an official survey ascertaining and settling its boundaries and nature, and that the laws of Congress require each townsite occupant to see to it that the official ascertainment is true and correct and satisfactory before accepting confirmation of his equitable rights from the mayor-trustee. Therefore, as the rights of the parties depend upon a construction of the aforesaid townsite laws of Congress, the record presents federal questions, to be determined upon the *merits*, as to the proper construction of section 2387 as affecting the authority of the trustee.

Dunton *vs.* Muth, 45 Fed., 390-395, and authority cited.

The Nature of the Grant.

In one case it is held that the entry initiates a grant to the several townsite occupants and to them collectively, and that "the grant to an individual could not take effect until the extent of his occupancy had been defined and determined by some proper authority. The grant to the aggregation could not take effect until all of the individual occupancies had been defined and set aside."

Newhouse *vs.* Simino, 3 Wash., 648-652.

This is not an exact correct statement of the grants initiated under the laws of Congress by an entry of a townsite. The several grants, including the grants of streets, alleys, commons, etc., to the city and the distinct and several

grants to the various occupants of the public domain, "take effect" and vest equitable titles immediately upon the day of filing the application to enter the townsite (Lockwitz *vs.* Larson (Utah), 52 Pac., 279), but the boundaries of such private occupations, such existing streets, alleys, and commons, must be ascertained in order to confirm the grants or the equitable titles.

Ashby *vs.* Hall, 119 U. S., 526.

Therefore the grant to the city of Lewiston upon filing the said application to enter the townsite was of D street to the extent of its boundaries as officially ascertained and established by the trustee, and the grants to the predecessors of the defendants in error and of the plaintiff in error were of the property to the extent of the boundaries of their individual grants as officially ascertained and established by the trustee, which official ascertainment was accepted when deeds were accepted according to it. So the grant under the laws of Congress to the city was of D street according to the official ascertainment and establishment of the grant, and the several grants to the predecessors of the parties to this action under the laws of Congress were of lots 6, 5, 4, 3, and 2, in block 24, according to the official ascertainment and establishment of the grants. This is what the Supreme Court of the State of Washington means when it says that "the grant to an individual could not take effect until the extent of his occupancy had been defined and determined by some proper authority. The grant to the aggregation could not take effect until all of the individual occupancies had been defined and set aside."

Newhouse *vs.* Simino, *supra.*

Although the State court charges that the mayor-trustee changed beneficiaries, there is nothing in all the record to substantiate the charge, as we understand the proposition. The mayor-trustee had to ascertain, establish, and define the boundaries of the various several and distinct grants from

Congress. To do so, he made an official survey of each of them. The defendants in error claim, and the State court held, that he did not correctly ascertain, establish, and define the boundaries of each of these several and distinct Congressional grants (Trans., pp. 117 to 131, inclusive). If there had never been a D street and if the mayor-trustee had attempted to lay out and establish D street over the private, individual grants from Congress to each of the predecessors of the parties to this action, it could be held that the trustee did attempt to make the beneficiaries under the laws of Congress, for then he would not be surveying, ascertaining, or establishing the boundaries of a Congressional grant, but would be attempting to make a grant to use a slang phrase, "out of whole cloth," which he could not do, pretending to have such authority and power under the laws of Congress. The attempt might be characterized as an attempt to substitute one who was not a beneficiary for one who was; it could never be a change of beneficiaries. A mistake, if there was one, in ascertaining the true boundaries of the several grants—the grant to the city of Lewiston of D street, the grants severally to each of the predecessors of the parties to this action—cannot be characterized as a change of beneficiaries, since all the deeds were based upon and according to the ascertainment of the Congressional grant to the city of Lewiston by the trustee, because, as has been seen, the Congressional grant of D street to the city of Lewiston, with the consent of all interested parties by accepting deeds, has taken effect conclusively according to the ascertainment, and has become fixed and fastened to that portion of the earth's surface within the boundaries of D street as officially surveyed.

The State court has attempted to characterize the official survey of D street as an attempt to make a "paper street" (Trans., pp. 117 to 126). This cannot be. The street was there when the application to enter the townsite was filed, and therefore the laws of Congress made it a street for all

time to come, if not vacated by proper authority; it was a granted street, the boundaries of which were to be officially ascertained and established, so that the grant would become fixed to certain definite land upon the earth's surface, that there could and would be no uncertainty as to the boundaries of the Congressional grant to the city of Lewiston.

We, as has been seen, contend that the grant of D street to the city of Lewiston is a Congressional grant, the boundaries of which were subsequently to be ascertained and established; therefore the survey of D street is the survey of a Congressional grant and must consequently be a survey for and on behalf of the Government of the United States of lands granted by Congress, and that the mayor-trustee in making this survey directly represented and acted for the United States, and to this extent was an officer of the United States, to the end that the United States for itself might determine the boundaries of the grant by Congress to the aggregation and the boundaries of the several individual grants to the inhabitants, that the trustee might confirm all of these Congressional grants under the townsite laws of Congress. We therefore strongly contend that, after the survey of the Congressional grants and their confirmation by the trustee, the survey is entitled to the same protection as any other United States survey, and that the State courts have no authority over it other than that necessarily conferred, in the first instance, by the townsite laws of Congress, which is a jurisdiction of regulation to make it what the laws of Congress expected it to be, and this jurisdiction of regulation is defeated after the several and various Congressional grants have been confirmed upon the survey officially made of them, and that the State court has no more jurisdiction to overthrow the survey which has become a part of the confirmation than it has to overthrow or change any other official survey of any other Congressional grant, or any official survey which has become a part of a patent from the United States. Such is the rule as to an official

survey of the United States Government of its public land which has been granted or conveyed by patent (Cragin *vs.* Powell, 128 U. S., 691), and such should be the rule as to the individual grants and the grants to the aggregation brought into existence by a townsite entry under the laws of Congress, notwithstanding that the entire townsite has been, as to its outside limits, surveyed for the purpose of conveyance from the United States to the trustee that he might have the title to the entire townsite to carve out confirmation of the several grants by official and conclusive evidence of the boundaries of the various grants, direct to each individual and to the aggregation, in order that each Congressional grant should "take effect" according to the ascertainment of it officially made by the proper authority (Newhouse *vs.* Simino, 3 Wash., 648-652); and when the various Congressional grants have taken effect according to the official ascertainment by the proper authority, they should be inviolate and unimpeachable by the State courts and should come within the rule of law announced in Cragin *vs.* Powell, 128 U. S., 691.

Having now established that the grant of D street to the city of Lewiston took effect according to the official survey, and that the grant to the townsite occupant, predecessor of the plaintiff in error, was confirmed upon the official survey by deed, the individual Congressional grant to the predecessor carried with it a Congressional grant of the appurtenant rights in, to, and over all of the Congressional grant to the city to the limits of the survey upon which the said grant took effect because the survey after confirmation cannot be impeached and the boundaries shown by parol to be other than the official boundaries upon which the Congressional grant took effect, the boundaries of which were unascertained at the time of filing the application to enter the townsite.

Ashby *vs.* Hall, 119 U. S., 526.

Moore *vs.* Walla Walla (Wash.), 2 Pac., 187.

Boise City *vs.* Flanagan (Idaho), 53 Pac., 453.

Laughlin *vs.* Denver (Colo.), 50 Pac., 917.
Newhouse *vs.* Simino, *supra.*
City of Carondelet *vs.* City of St. Louis, 66 U. S., 179.
Galt *vs.* Galloway, 29 U. S., 332.
Haydel *vs.* Dufresne, 58 U. S., 23.
Greer *vs.* Mezes, 65 U. S., 268.
Cragin *vs.* Powell, 128 U. S., 691.

That the courts had jurisdiction before confirmation of the Congressional grant to the townsite inhabitants and upon application, within the time allowed for initiating the proceedings, to obtain confirmation of the Congressional grant, and upon parol testimony to order and compel the mayor-trustee to survey correctly the Congressional grant of D street to the city of Lewiston, in so far as the survey of this grant interfered with the Congressional grants to them and to each of them, there is no doubt, no question; but after confirmation of the several grants by accepting deeds according to the mayor-trustee's ascertainment of the boundaries of D street, as granted by Congress, the only *jurisdiction courts of equity could have* is the jurisdiction to set aside the confirmation for fraud or mistake—a mistake which was unknown to the townsite inhabitant. Because the confirmation of the Congressional grant to him, with knowledge of a mistake in the survey, carries with it the waiver of his right to confirmation of a larger grant from the United States and is conclusive evidence that he intended to confirm his equitable rights under the laws of Congress to the official survey of the Congressional grants to the city.

Boise City *vs.* Flanagan (Idaho), 53 Pac., 453.
Moore *vs.* Walla Walla (Wash.), 2 Pac., 187.
Laughlin *vs.* City of Denver, *supra.*
Newhouse *vs.* Simino, *supra.*

II.

There is something said in the answer of the defendants in error as to the red lines upon the plat, but there is no evidence of field notes, or monuments upon the ground, indicating any amendment of the official survey. The field notes and monuments upon the ground absolutely control the plat.

Harrington *vs.* Boehmen (Cal.), 66 Pac., 214.
Whiting *vs.* Gardner (Cal.), 22 Pac., 71.
Martin *vs.* Carlin, 19 Wis., 454.
McEvoy *vs.* Loyd, 31 Wis., 142.
Campbell *vs.* Clark, 8 Mo., 553.
Greer *vs.* Squire, 9 Wash., 359.

We challenge a careful examination of the applications for lots 3 and 2 of block 24 for a description of any land other than the lots of the official survey, and we also challenge a careful examination of the mayor-trustee's deeds of lots 5, 4, 3, and 2 of block 24 for a description of land other than the lots of the official survey, and we assert, without fear of contradiction, that only lots 5, 4, 3, and 2 of the official survey are described in the deeds and in the applications. The attempt in the deed to lot 2 to describe an addition thereto is futile, because the description of the addition is absolutely void for uncertainty, which is self-evident upon an examination of the deed. The description puts the addition at no certain place, and it is of so large dimensions that it is impossible to make it fit that land in D street claimed by Mrs. Squire. The only way to make it fit this land is to reform the deed and place therein a description to fit the land claimed. The State Supreme Court seems to have attempted to do this very thing, for it says, in its opinion, that some of the defendants in error have deeds to lots fifty feet long, meaning that the trustee conveyed a part of D street to the predecessor of Mrs. Squire. The State Supreme Court

seems to make the word "amendment" in the trustee's deed to John Q. Moxley mean that he has a deed to a lot fifty feet long. It is but a matter of law as to what the deeds describe, and therefore the Supreme Court of the United States can pass upon this question, and it will be found, upon examination, that the deeds introduce no dispute as to the boundary of the south side of D street by the official survey and ascertainment.

In this connection it must be remembered that the regulations of the Territory for the execution of the Congressional grants or trusts, as to their ascertainment and boundaries under the laws of Congress and the confirmation of the various grants to the persons to whom Congress granted them, contain a provision that, after the official ascertainment of the grants to the aggregation, such as streets, alleys, and commons and the survey of private occupations into blocks and lots and upon notice being given, which notice was presumed to be given as required, application for confirmation of the individual grants and the proof of them may be made within sixty days, and that six months is a complete bar. This regulation is a reasonable one, for the grants must be confirmed speedily, on account of changing conditions, and, after the expiration of the limitation, the townsite occupant has no right to file the application or to make proof of occupation, because he then has no rights in law or in equity which he can enforce against the trustee *or against his adjoining townsite occupants.*

Cofield *vs.* McClelland, 16 Wall., 334.

This being the law as declared by the Supreme Court of the United States, it could not be intended that the most important part of the execution of the trusts was to be left open, which is the ascertainment and establishment of the boundaries of the Congressional grants to the aggregation, to wit, the grants of streets, alleys, and commons, and that at any time a townsite occupant could come into a court of

equity and claim the right to have the boundaries of the Congressional grants ascertained and established notwithstanding the official ascertainment which he had accepted by accepting a deed. IT MUST RESULT IN THE CONCLUSION THAT, IF THE ASCERTAINMENT OF THE CONGRESSIONAL GRANTS WAS INCORRECT, the townsite occupant must move to have the ascertainment corrected, at least, within the time allowed to apply for and to get confirmation of the individual grant to him. The application for confirmation may be accompanied with an application for correction of the ascertainment, together with the proof of the occupation with which the official survey conflicts, and if the mayor-trustee does not cause the ground claimed, which had been surveyed as a part of the street, to be resurveyed as private property, giving the field notes and monuments of the resurvey, the TOWNSITE OCCUPANT WOULD HAVE THE FOUNDATION OF A SUIT IN EQUITY TO COMPEL THE MAYOR-TRUSTEE TO RESURVEY THE GROUND AS PRIVATE PROPERTY, and, when the courts acted upon the matter, they could order the resurvey and the deed made according to and upon the resurvey. But should the townsite occupant apply for a deed to more than had been surveyed as private property, and, without correction of the official survey, accept a deed to the lot officially surveyed, he would waive all rights in law and in equity to have the official survey corrected and a deed upon the corrected survey. THIS IS THE POSITION OF THE PREDECESSORS OF THE DEFENDANTS IN ERROR, IF ANY OF THEM HAVE SHOWN AN OCCUPATION OF THE GROUND CLAIMED AT THE PROPER TIME TO HAVE OBTAINED A GRANT FROM CONGRESS, UNDER THE TOWNSITE LAWS, LARGER THAN THE GRANT OF WHICH EACH VOLUNTARILY ACCEPTED CONFIRMATION.

Now, if it should be that any deed to the streets of Lewiston was made to any townsite occupant, that deed is absolutely void, because the mayor-trustee, under the laws of Congress, nor under the territorial regulations, had no authority or power to deed to private persons a part of a sur-

veyed street which had been existing, and the regulations of the Territory expressly forbid the deeding of streets to private persons.

Amador County *vs.* Gilbert (Cal.), 65 Pac., 130.
Parchen *vs.* Ashby (Mont.), 1 Pac., 204.
Section 3, Territorial act.

There can be no legal deed made to any individual of a portion of a townsite not officially surveyed as private property.

State *vs.* Webster (Mont.), 72 Pac., 295, and authority cited.

By the foregoing discussion and citation of authority we have prepared the way for statement of the necessary and essential authority and power of the trustee under the laws of Congress. We have established that there are several individual grants and grants to the aggregation which were brought into life by the laws of Congress upon the filing in the land office of the application to enter the townsite, and that these various grants severally vested, then and there, long before the United States by patent transferred the legal title to the whole townsite, and we have established that the legal title was transferred to the trustee so that he could confirm the aforesaid Congressional grants which had vested long before date of patent to him. The trustee, therefore, in the very nature of the process of confirmation of Congressional grants, becomes an officer of the United States in whom the United States has vested the legal title to all of the Congressional grants which had already vested in order to clothe him with the power and authority to confirm the various Congressional grants. Now, at the time these various Congressional grants to the individual inhabitants and to the aggregation vested, they were unsurveyed and unascertained in so far as their boundaries were concerned, save only by occupation then and there, and therefore their bound-

aries had to be ascertained and they had to be fastened to the portion of the earth occupied, by written, conclusive evidence, which was to be the confirmation, or "disposal," spoken of in the townsite laws of Congress. The regulations for the execution of the powers of the trustee under the laws of Congress were to be provided by the State or Territory.

Now, it appears conclusively that the mayor-trustee must have the power and authority, necessarily and essentially, to ascertain the nature and extent of the various several Congressional grants, and to establish them and deliver to their owners conclusive evidence of their establishment and boundaries upon the earth's surface. He must have the authority and power to ascertain and establish the boundaries of the grants to the aggregation before he could make deed in confirmation of the individual Congressional grants to the several inhabitants; and, having this power and authority as a necessary and essential part of the very trusts of which he was the trustee, he had the power and authority to make errors and mistakes of facts in the discharge of his official duties. If the laws of Congress gave him no jurisdiction, no authority, and no power to make mistakes and errors in the lawful execution of a power and authority, then he only had the authority and the power, under the laws of Congress, to make absolutely correct official surveys of the Congressional grants aforesaid, and to confirm them to their owners absolutely, correctly, as occupied, and an error of one inch would be fatal. In such functions he became the most perfect machine that has ever been given human life. He became more perfect than any court of men in all the world since the creation of man, because courts with power and authority to decide disputes between men, and to establish their rights as against each other, do make mistakes and errors. Mistake and error are parts of human life. So it is monstrous to hold that Congress expected the trustee to be a perfect man, above mistake and error. When error and mistake have led courts to a wrong

judgment, that judgment has been characterized as a voidable judgment; and the same charity should be extended to the official acts of the mayor-trustee, though he has made errors and mistakes in the exercise of a lawful, necessary, and essential power and authority. The mayor-trustee had power and authority over the subject-matter, to wit, the several Congressional grants; he had power and authority to ascertain their existence and their boundaries and to establish them by confirmation beyond all dispute, save only subject to the supervision of the courts to correct his official mistakes and errors. He had power and authority over the person of the townsite occupants upon their filing with him their applications for his confirmation of their rights under the laws of Congress and upon their making the proof of the Congressional grants. The confirmation must come through the trustee. He had power and authority to execute the several trusts, and the execution consisted simply in the ascertaining the boundaries of the various trusts and delivering written, conclusive evidence of them to their respective owners. When this evidence was delivered and received, all trust relations ceased forever as between the owner of the Congressional grant and the trustee. It is seen that, in the very nature of the unascertained boundaries of the several grants to the inhabitants and of the grants to the aggregation, he must make an official survey upon which to confirm each of the aforesaid Congressional grants, which survey must become a part and parcel of the confirmation, and that the confirmation can have no existence without the sustaining of the official survey as valid; therefore all his surveys of Congressional grants, such as existing streets and existing occupations of private lands, must be held to be either valid absolutely or only voidable. When he officially surveys an existing street, he cannot be held to be taking property for a public purpose; he is only trying to find and ascertain existing boundaries, existing occupations, dividing lines. The same rule which is applied to a county surveyor when

under authority of law he surveys the dividing line between the private-property owners ought to be applied, at least, to the official survey of D street, in the city of Lewiston, Idaho; and this rule, for mistakes and errors, makes the survey voidable and not absolutely void.

Watkins *vs.* Havighortst, 74 Pac., 318.

In the matter of a county survey, the parties are not called upon to act and to have their titles or rights confirmed by the surveyor or trustee, as in the case of the Lewiston townsite. The inhabitants had to apply to the trustee to have their rights confirmed upon and according to an official survey. Therefore the acceptance of a deed merged all rights to confirmation in the deed and the official survey. It is this way, in further illustration of the force of the confirmation: The parties for whom the county surveyor made the survey carry the controversy into court, and the court by a judgment confirms the survey; the survey becomes final if there is no appeal, because the court has the power of confirmation. The townsite inhabitants accepted deeds upon and according to the official survey and did not appeal to the courts for any other or different survey, and the trustee had the power of confirmation under section 2387 of the Revised Statutes of the United States, subject to control of the courts preceding confirmation. The survey, if wrong, was voidable; and not being avoided, when there was an opportunity to do so, but being accepted and confirmation taken upon and according to it, it has become a part of the title of the plaintiff and defendants in error, and therefore today MUST BE HELD TO BE A CORRECT AND UNIMPEACHABLE EXERCISE OF THE AUTHORITY OF THE TRUSTEE, WITHOUT FRAUD OR MISTAKE ON HIS PART, AND A CORRECT ASCERTAINMENT AND ESTABLISHMENT OF THE BOUNDARIES OF D STREET, IN THE CITY OF LEWISTON, IDAHO, AND THE DEFENDANTS CANNOT PROVE ANY OTHER OR DIFFERENT CONGRESSIONAL GRANTS TO THEIR PREDECESSORS THAN

THOSE OFFICIALLY CONFIRMED TO THEM BY THE MAYOR-TRUSTEE AND DESCRIBED IN THE DEEDS TO THEIR PREDECESSORS.

The State courts made a mistake in the complete comprehension of the purpose and office of the official survey as a part of the accepted confirmation and rejected the official survey of D street and the deeds accepted thereupon as any evidence of the boundaries of the Congressional grants, and held that certain facts as to occupation were undisputed, when in fact the deeds accepted and the official survey conclusively disputed these facts, in that the Congressional grants took effect according to the survey and deeds with the consent of the predecessors of the defendants in error and constitute, as has been seen, a complete, conclusive estoppel against the defendants in error to claim larger Congressional grants. The State courts avoided this written conclusive evidence by holding that the acts of the trustee were absolutely void and in no way binding upon the defendants in error; also some reliance is placed upon simple possession perpetuating the unconfirmed title which the defendants in error claim, and that, because of possession, the predecessors could accept confirmation of a part of their Congressional grant and hold the other, unconfirmed part, open indefinitely, to be confirmed by the State courts upon parol testimony showing that the survey was void and that they did not get confirmation of all the Congressional grant. This mistake of the State courts is one of law and not of fact and vitiates their judgment, and requires its reversal because it defeats the private rights of the plaintiff in error which he holds, as has been seen, under the grant to his predecessor by Congress, and which was confirmed to James McGrau, his predecessor, who applied for and accepted confirmation, as a townsite occupant, of all his equitable rights under section 2387, Revised Statutes of the United States.

The Nature of the Grant Further Considered and the Remedy.

Having now reached the conclusion that the deeds and the official survey are conclusively binding upon the defendants in error, and that they can have no equitable rights in and to the land claimed by them and have not the legal title to any of it, and that this land claimed by them forms a part of the Congressional grant to the aggregation, to the city of Lewiston, possession of such land has been, at all times since the acceptance of deeds upon the official survey of D street, if any possession dates back to this period, wrongful and unlawful and the maintenance of a private and public nuisance, giving no possessor thereof any rights in law or in equity as against the city or as against the plaintiff in error.

Woodrull *vs.* Mining Co., 9 Sawy., 513-517; 18 Fed., 753.
Mills *vs.* Hall, 9 Wend., 315.
McLean *vs.* Llewellyn Iron Works (Cal.), 83 Pac., 1083.
Laughlin *vs.* City of Denver (Colo.), 50 Pac., 917.
Wolf *vs.* Sullivan (Ind.), 32 N. E., 1018.
Hall *vs.* Byfogle (Ind.), 70 N. E., 883.
Blin *vs.* Blankenship (Ky.), 77 S. W., 919.
Village of Lee *vs.* Harris (Ill.), 69 N. E., 230.
Atlantic City *vs.* Snee (N. J. Sup.), 52 Atl., 372.
City of Lewiston *vs.* Booth (Idaho), 34 Pac., 809.
Webb *vs.* Birmingham, 9 So., 161.
Oakland *vs.* Oakland, etc., Co., 50 Pac., 277.
Orena *vs.* Santa Barbara, 28 Pac., 268.
Mills *vs.* Los Angeles, 27 Pac., 354.
Visala *vs.* Jacobs, 4 Pac., 433.
People *vs.* Pope, 53 Cal., 437.
Sullivan *vs.* Tichner, 53 N. E., 759.
Cheek *vs.* Aurora, 92 Ind., 107.

Lee *vs.* Mund Station, 8 N. E., 759.
Waterloo *vs.* Union Mills Co., 34 N. W., 197.
Louisiana, etc., Co. *vs.* New Orleans, 9 So., 21.
Sheen *vs.* Stothart, 29 La. Ann., 630.
New Orleans *vs.* Magoon, 4 Mart. (La.), 2.
Thibodeaux *vs.* Maggiole, 4 La. Ann., 73.
Witherspoon *vs.* Meridian, 13 So., 843.
Vicksburg *vs.* Marshall, 59 Miss., 563.
Territory *vs.* Deegan, 3 Mont., 82.
Hoboken Land, etc., Co. *vs.* Hoboken, 36 N. J. L., 540.
State *vs.* Trenton, 36 N. J. L., 198.
Jersey City *vs.* State, 30 N. J. L., 521.
Tainter *vs.* Morrison, 18 N. J. L., 46.
Cross *vs.* Morrison, 18 N. J. L., 306.
Jersey City *vs.* Morris Canal, etc., Co., 12 N. J. Eq., 547.
St. Vincent Female Orphan Asylum *vs.* Troy, 32 Am. Rep., 286.
Morrison *vs.* New Pork, etc., Co., 74 Hun. (N. Y.), 398.
Milhan *vs.* Sharp, 27 N. Y., 611.
Mills *vs.* Hall, 9 Wend. (N. Y.), 315.
Com. *vs.* Moorhead, 12 Atl., 424.
Kopf *vs.* Utter, 101 Pa. St., 27.
Kittaning Academy *vs.* Brown, 41 Pa. St., 269.
Baxter *vs.* Com., 3 Penn. & W. (Pa.), 253.
Com. *vs.* McDonald, 16 Serg. & R. (Pa.), 390.
Philadelphia *vs.* Crump, 1 Bewst. (Pa.), 320.
Philadelphia *vs.* Friday, 6 Phil. (Pa.), 276.
Chafe *vs.* Aiken, 35 S. E., 800.
Sims *vs.* Chattanooga, 2 Lea. (Tenn.), 694.
Memphis *vs.* Lenore R. C., 6 Coldw. (Tenn.), 412.
Raht *vs.* Southern R. Co., 50 S. W., 72.
Pates *vs.* Warrenton, 84 Va., 337.
Taylor *vs.* Com., 29 Gratt. (Va.), 780.

Ralston *vs.* Weston, 33 S. E., 326.
Teas *vs.* St. Albans, 17 S. E., 400.
Childs *vs.* Nelson, 33 N. W., 587.
Simplot *vs.* Chicago, etc., R. Co., 5 McCreary (U. S.), 158.
Grogan *vs.* Hayward, 6 Sawy. (U. S.), 498.
Miller *vs.* City of Indianapolis, 101 Ind., 200.
Boise City *vs.* Flanagan (Idaho), 53 Pac., 543.

The enclosure and possession of a platted street which has been dedicated are immaterial, however long continued.

Laughlin *vs.* City of Denver (Colo.), 50 Pac., 917.
Boise City *vs.* Flanagan (Idaho), 53 Pac., 543.
Moore *vs.* Walla Walla (Wash. Ter.), 2 Pac., 187.
Hall *vs.* Bryfogle, 70 N. E., 883.
Wolfe *vs.* Sullivan (Ind.), 32 N. E., 1018.
Village *vs.* Harris (Ill.), 69 N. E., 230.
Atlantic City *vs.* Snee (N. J. Sup.), 52 Atl., 372.
Bohne *vs.* Blankenship (Ky.), 77 S. W., 919.

When the consent of the owner of private property who has derived his title from the Government of the United States upon the entry of a townsite has been obtained by his acts, indicating his consent, a trustee, under the townsite laws of Congress, can irrevocably dedicate such private property for street purposes by a plat and survey.

Boise City *vs.* Flanagan (Idaho), 53 Pac., 543.
Moore *vs.* Walla Walla (Wash. Ter.), 2 Pac., 187.
Laughlin *vs.* Denver (Colo.), 50 Pac., 917.

And upon such dedication by the survey and plat the private easements claimed by plaintiff in error vest in him irrevocably under and by force of the townsite laws of Congress under which the townsite was platted.

Dooly Block *vs.* Salt Lake, etc., Co. (Utah), 33 Pac., 229.

And such private easements in the street are protected by the Constitution and cannot be taken for a private purpose; and not for a public purpose without compensation.

Cyc., 1127.
Taylor *vs.* Porter, 4 Hill (N. Y.), 140.
McLean *vs.* Llewellyn Iron Works (Cal.), 83 Pac., 1083.
Eachus *vs.* Los Angeles Electric Ry. Co. (Cal.), 37 Pac., 750.

The first grantee of lot 6, in block 24, took right of way, right to view, right to light, right to symmetry of street according to and as the street was surveyed and platted and dedicated.

Dooly Block *vs.* Salt Lake, etc., Co., *supra.*
Prescott *vs.* Edwards (Cal.), 49 Pac., 178.
Hargo *vs.* Hodgdon (Cal.), 26 Pac., 1106.

These rights extend to that portion of the street covered by the buildings of the defendants in error and are not limited to the immediate front of lot 6, in block 24.

Ashby *vs.* Hall, 119 U. S., 526.
First National Bank *vs.* Tyson (Ala.), 32 So., 144.
Healey *vs.* Kelly (R. I.), 54 Atl., 588.
Tilly *vs.* Mitchell & Lewis Co., 98 N. W., 969.
Beaver *vs.* Baltimore, etc., Co. (Md.), 58 Atl., 21.
McLean *vs.* Llewellyn, etc., *supra.*

And since the possession relied upon by the defendants in error has at all times been wrongful and unlawful and since they encroach upon the legal and lawful street with an occupation which deprives the plaintiff in error of his rights under the laws of Congress, he should have a mandatory injunction against them; for the appurtenant rights of the

plaintiff in error are not confined to the front of his lot, but extend to that part of the street in front of adjoining lots.

Ashby *vs.* Hall, *supra.*
Dooly Block *vs.* Salt Lake, etc., Co., 33 Pac., 229.
First National Bank *vs.* Tyson (Ala.), 32 So., 144.
Lahr *vs.* Metropolitan, etc., Co., 104 N. Y., 268.
Beaver *vs.* Baltimore, etc., Co., 58 Atl., 21.
Dill *vs.* Board, 10 L. R. A., pp. 281, 282, 283.
Healy *vs.* Kelly, 54 Atl., 588.
McLean *vs.* Llewellyn Iron Works, 83 Pac., 1083.
Tilly *vs.* Mitchell & Lewis Co., Ltd., 98 N. W., 969.
Hall *vs.* Bryfogele, 70 N. E., 883.
Wolfe *vs.* Sullivan, 32 N. E., 1018.
Atlantic City *vs.* Snee, 52 Atl., 372.
Bohne *vs.* Blankenship, 77 S. W., 919.

The Application of the Townsite Laws to this Case.

A study of the regulations provided by the territorial legislature will establish that it is not provided that a part of the Congressional grant can be confirmed at one time to an individual occupant upon a plat or survey showing the official ascertainment of an existing street, and that the other part can subsequently be confirmed by the courts upon parol testimony, thirty years after the first confirmation, without an official survey of it as private property to be confirmed. The regulation for such an execution of the trust has not been provided, but the regulation for a complete and final confirmation of all Congressional grants in a speedy manner was intended by the requirement that application for confirmation and proof of the Congressional grants must be filed within sixty days and obtained within six months after the time came to receive the application and proof, and that all rights to confirmation after six months should be absolutely forfeited to the aggregation. (Section 9, Territorial Regulations.) The State court ig-

nored these provisions of the territorial regulations and exercised a jurisdiction that it did not possess, to wit, jurisdiction to ascertain, fix and determine, without an official survey and contrary to an official survey, the boundaries of the Congressional grants, independent of the power and authority of the mayor-trustee to officially ascertain and fix the boundaries of these grants and to confirm, with the consent of their owners, these grants, as ascertained and established by him, to each owner thereof. The Supreme Court of the State, under the townsite laws of Congress, is not empowered to make laws for the regulation or execution of the Congressional trusts, and by and upon these regulations made by such court overthrow the confirmation of the mayor-trustee, under and upon the claim that the trustee had no power or authority to confirm the Congressional grants as he did. A study of the townsite laws of Congress will reveal the fact that Congress never intended the confirmation of the Congressional grants should be in parcels, with thirty years intervening, and one part not surveyed as a private grant; and it also will be established, by an inspection of these townsite laws, that Congress never intended that a part of the Congressional grant should be confirmed by the trustee and a part of it confirmed by the State court, without an official survey, as a part of a private grant, on the ground that the confirmation to the city of Lewiston by the trustee was absolutely void as to the part cut off into D street, and on the ground that that part should have been confirmed to the predecessors of the defendants in error, and should not have been officially surveyed as a part of D street. The State courts cannot throw the confirmation of the mayor-trustee into hopeless confusion and place the plaintiff in a four-foot hole and disturb the private rights of parties accruing to them upon the confirmation of the Congressional grants by the mayor-trustee. If the jurisdiction existed to do such a thing, a court would hesitate to attempt a readjustment of the confirmation of the Congressional grants upon such un-

certain evidence as is found in this record, and after the expiration of thirty years from the time the predecessors accepted confirmation from the trustee. The right to another and additional confirmation, upon the ground that the trustee made a mistake in which the predecessors of the defendants in error acquiesced, is so stale and dried that it has no life in a court of equity and cannot be considered.

Abraham *vs.* Ordway, 158 U. S., 416.
Penn. Mutual L. Ins. Co. *vs.* Austin, 168 U. S., 685.
Galliher *vs.* Cadwell, 145 U. S., 368.
Cook *vs.* Barrett (Mass.), 29 N. E., 625.
Lutjen *vs.* Lutjen (N. J. Eq.), 53 Atl., 625.

The court will notice that none of the defendants in error were in possession of any ground in 1871, when the townsite application was filed in the land office, and that therefore the individual possession of any of them fails to make any of them the owner of an equity or a Congressional grant under the townsite laws of Congress, and that each of them must become the owner of such Congressional grant by succeeding to the rights of some predecessor who may have owned such grant by reason of occupation on the day of filing the application to enter the townsite. None of them received deeds from the mayor-trustee (Transcript, pp. 29, 39, 40, 43), except John Q. Moxley (Transcript, p. 31), and in 1874 he purchased from Dr. Kelley (Transcript, p. 94). There is not even a pretence in this case on the part of any of the defendants in error to prove that any of them has a deed describing a larger Congressional grant than that described in the deed from the mayor-trustee. There is no deed from the owner of a larger Congressional grant describing the ground in D street now claimed by each of the defendants in error; and this is evidence, if any of their predecessors owned a larger Congressional grant, that it was the intention of the said predecessor to claim no greater Congressional grant than the one to which he received a deed in

confirmation from the mayor-trustee. Therefore it is impossible for any of the defendants in error to be the owners of a larger Congressional grant than that described in the mayor-trustee's deeds.

Laughlin *vs.* Denver, 50 Pac., 917.

And so, under the laws of Congress, none of the defendants has a right, in the slightest degree, to question the correctness of the official survey of D street, or confirmation of the street to the city of Lewiston, or the confirmation of rights therein as appurtenant to lot 6, block 24, to the predecessor of the plaintiff in error.

Laughlin *vs.* Denver, *supra.*

We maintain that the Congressional grant to individuals under the townsite laws of Congress brought into existence by filing the application in the land office to enter the townsite is upon a condition subsequent, which is that it must be confirmed by the trustee within a reasonable time after he, the trustee, is prepared to confirm upon an official survey of the grants to the aggregation (such as streets) and the official survey of private occupations; that possession or continued occupation of the Congressional grant by its owner cannot excuse the necessity of confirmation within a reasonable time, and that therefore, though its owner remains in possession, if he fail to initiate proceedings under the regulations within the time allowed therefor he forfeits all rights to confirmation of the grant to him under and by force of the townsite laws of Congress, and his grant merges in and becomes a part of the grant to the aggregation subject to be appropriated for streets or for the common benefit of all through sale as private property.

Cofield *vs.* McClellan, 16 Wall., 334.

Lauglin *vs.* Denver, *supra.*

Boise City *vs.* Flanagan, *supra.*

Moore *vs.* Walla Walla, *supra.*

Especially is this true where he applies for and receives a deed upon an official survey that establishes a street, thereby conforming his Congressional grant to the official ascertainment of the Congressional grant of the street to the city; and, having complied with the condition subsequent as to obtaining confirmation of his grant within a reasonable time, and asking for confirmation of no greater grant, which would be in conflict with the grant surveyed and set off to the city as the grant under the laws of Congress (coming into existence upon filing the application to enter the townsite), *it will be conclusively presumed, as against him, that the Congressional grant to the city was correctly ascertained, established, and bounded by the official survey,* and, likewise, it must be conclusively presumed, as against him, that any possession of the ascertained and established street under the townsite laws of Congress is wrongful, unlawful, and the maintenance of a private and public nuisance.

These reasonable conclusions cannot be defeated by the defendants in error reminding the court of possession. Possession was the tenure of title before the entry of the townsite; but there is no law making it the tenure of title after the entry of the townsite; there is no law dispensing with the necessity of confirmation of the Congressional grant. Possession is by far a too uncertain tenure of title, and gradually we have come to have written evidence of titles making it safe to leave the possession of the property, and it was the plain purpose of Congress to require the townsite occupant in possession to obtain, within a reasonable time, this written evidence in confirmation of the Congressional grant to him. The rule must operate against the townsite occupant in possession as well as against the one out of possession after the entry of the townsite, for it is a matter of common knowledge that the larger number of townsite occupants will remain and continue their possession; so, if the rule did not operate as to these, the confirmation as to them could be indefinitely postponed and the trust never executed

by the mayor-trustee. There could be all kinds of street jumping and all kinds of confusion, just as before the entry of the townsite, which was never in the least intended by Congress. So possession of ground not within the boundaries of an accepted confirmation in satisfaction of rights under section 2387, Revised Statutes of United States, cannot perpetuate and keep alive right to confirmation of such ground or land, so that a court in 30 years from accepted confirmation, upon parol evidence, can confirm the additional land.

Cofield *vs.* McClelland, 16 Wall., 334.

In the case of Scully *vs.* Squier, *supra,* which appellant is now seeking to have reviewed, the Idaho Supreme Court quotes with approval the following statement from Stingfellow *vs.* Cain, 99 U. S., 610:

"The occupant of a lot at the *time the entry* of a townsite is made is its real owner."

This rule is settled beyond question.

It is undisputed that the time of the entry in the case at bar was November 21, 1871. But there is absolutely no evidence in the record that the defendants or any of them or their predecessors in interest occupied the land in controversy on that date, save only as to ground claimed by Mrs. Squier. Hence the lower courts have found facts and based their decision thereon which are unsupported by any testimony, oral or written.

We do not ask this court to disturb any finding of fact, supported by proof, however shadowy, but this court is not bound by a finding of fact based on absolutely no testimony.

Courts certainly cannot assume or create facts not in evidence and dispose of the rights of litigants by basing decisions thereon, and escape review in the appellate court on the assumption that findings of fact will not be disturbed. There is evidence of general street lines at various times, but we claim no evidence of specific occupation of the specific

ground claimed by John M. Fix and John Q. Moxley at the time they had to show occupation to vest equities.

We respectfully urge this court to scrutinize the record closely for any testimony in support of a finding that the ground claimed by the defendants in error, John Q. Moxley and John M. Fix, was occupied by any one on the 21st of November, 1871, or at the time of the entry of the townsite.

The record discloses that the city of Lewiston was settled in 1861, upon what was a part of the Nez Perces reservation. It was a distributing point for the various mining camps to the northeast, east, and southeast.

Scully *vs.* Squier, *supra.*

The court will take judicial notice that in the impromptu building of the various mining towns during the early settlement of the West, but little regard was paid to blocks or streets. A store or trading post was erected on Indian paths or pack trails leading to the mines. Other temporary shacks were constructed until a row of shanties of varying sizes and lengths would border the principal trail. These trails, however crooked and irregular, ultimately became streets.

Let us assume, for the sake of argument, that the ground claimed by the defendants was occupied by them or their predecessors in interest at the time title vested under the laws of Congress.

Is it not in accord with sound sense and reason to assume that the statutory provisions relating to the survey and platting of such townsites were intended, both by the National and State legislators, among other things, for the very purpose of straightening and necessary widening the crude streets thus formed?

Is the surveyor acting in virtue of such acts bound to make the streets follow the irregular windings of an Indian trail, and twist its border lines in and out to evade every projecting shack or fence?

The dual nature of the trust, the fact that it is to be executed with due regard to the interests of the city as a

whole, as well as of the individual members of the community, precludes the contention that the surveyor must sacrifice the symmetry and utility of the streets to every corral or shanty that may project into them.

Furthermore, it is to the interests of the individuals involved as well as of the municipality to have straight and regular thoroughfares, and to obtain such the surveyor might properly assume authority under the law to cut off a few feet of a projecting wooden shack or discommode some temporary calf-corral.

We find no fault with those cases which hold that the townsite trustee or surveyor cannot dedicate a street through the premises in possession of an occupant, thus creating an entirely new and different street and executing no trust whatever under the laws of Congress, at the expense of a particular individual, but we submit that not a single authority can be cited which opposes the right of the surveyor under the townsite acts to straighten, systematize, widen, or change the streets, existing as Congressional grants, within reasonable limits, having in view the welfare of the city as well as the individual and an equitable execution and adjustment of all townsite trusts.

In the very nature of things, all the improvements in the early settlement of the West were of a cheap and often transitory nature. Shacks and enclosures were constructed one month and torn down, changed or moved the next. To assert that the surveyor must zigzag his street lines to avoid the tent-stakes of every squatter seems to us an absurdity. At any rate, the plaintiff in error maintains that, after accepted confirmation, the townsite occupant, thus accepting confirmation, cannot prove by parol that the acts of the trustee were not according to law and as required in law.

The case of Laughlin *vs.* City of Denver, 50 Pac., 917, is squarely in point.

In that case the court say:

"On May 29, 1865, F. J. Ebert, city surveyor of the city of Denver, filed with the clerk of said city a map of the then

city of Denver, which was approved by the city council on June 22, 1865, and filed for record with the clerk and recorder of Arapahoe county on June 29, 1865; that there is shown on said map outlot or block No. 257, in what is known as the 'West division' of the city of Denver, and to the west thereof is marked 'Jefferson street'; that the land in dispute is a part of the street so marked. * * * On July 13, 1865, plaintiff bought from Sagendorf and wife, the occupants thereof, a tract of land enclosed by a certain fence, which included the land described in the complaint, upon which there stood at the time a log house, and also the land described in Ebert's map as outlot or block No. 257, and received from them a quit-claim deed, which he supposed described the whole tract, but which conveyed only that portion designated as outlot or block No. 257. Plaintiff entered into possession of the land so purchased; occupied and lived in the log house; in 1866 planted trees, and built a stable, corral, barn, and outhouses, and in 1871 built a frame house on the land in dispute; plowed and used the balance of the ground for gardening and grazing purposes; occupied, used, cultivated, and possessed said land uninterruptedly from July 13, 1865, to February 10, 1893, when the defendant under claim of title, as aforesaid, entered upon said land, cut down and removed the trees, houses, and other improvements thereon, and took possession of the land in controversy as a portion of Jefferson street, which, up to the latter date, had not been opened or used by the defendant. * * * But, in view of the relation which the plaintiff holds to the property, he is precluded from assailing the validity of this deed [meaning the deed of the probate court to the city of the streets]. * * * He derived no ownership to the property in dispute by the deed from Sagendorf and wife, since it conveyed only the outlot or block No. 257, whose metes and bounds were specifically described in the map then on record, and which designated the property in question as a part of Jefferson street, but rather must be held to have thereby recognized the existence of the street. * * *

"It follows that the plaintiff has no interest in the land in dispute, either by deed or adverse possession, that entitles him to maintain this action, and the judgment of the district court is therefore affirmed."

Boise City *vs.* Flanagan, 53 Pac., 453, is also squarely in point and should have been controlling in the case at bar. We quote:

"After platting or dividing said townsite into blocks, streets, and alleys, a part of the tract so claimed by Stout lay in the street and a part was platted as a fractional block; * * * Shortly after the passage of said act by the legislature of the Territory of Idaho, said Stout made application thereunder to the mayor of said city for a deed to said fractional block, in which application he did not include the premises in controversy which had at that time been platted as a street. A deed was issued to him by the mayor for said fractional block. He thereafter, in May, 1871, sold and conveyed said fractional block to said James Dunn, in which conveyance he also described the land in controversy. * * *

"Stout by his acts, to wit, after the premises claimed by him had been platted, a part of it into a fractional block, and the remainder into a street, showed his intention to conform his claim to said plat by making application for a deed to said fractional block, and making no application whatever to that part included in the street. A deed was executed to him of the land included in his application and no application has been made by him or his grantor for a deed to the land in controversy. * * * The conclusion is irresistible that if said Stout ever had a right to said premises as a townsite occupant he abandoned it."

Citing Young *vs.* Tiner (Idaho), 38 Pac., 697.
Thompson *vs.* Holbrook, 1 Idaho, 610.

The authorities are clear that a townsite claimant may so acquiesce in the official survey as to abandon his claim to all ground not allowed him on the plat.

In all such surveys the occupants must concede something for the sake of uniformity and regularity in thoroughfares, and the municipal authorities seldom disturb the transitory shacks and enclosures, but both occupant and municipality rely upon the survey for ascertaining the boundary lines, when the growth and development of the city have reached a stage to justify the erection of substantial and permanent improvements.

While we strongly contend that there is no evidence of the occupation of any part of D street by defendants or their predecessors in interest at the time of the entry, except as to land claimed by Mrs. Squier, and that such unsupported findings amount to no more than conclusions of law which this court will review, yet we further assert, in the language of the Supreme Court of Idaho in the Flanagan case, that if defendants ever had a right to any part of D street as townsite occupants they abandoned it and voluntarily accepted their confirmation according to the official survey.

They are estopped by accepting deeds according to the True survey and by a silent acquiescence of some thirty years from now attacking such survey.

In all towns that sprang up in the early history of the West, locations for buildings were cheap. No one was cramped for room, and the taking of a few feet of ground to straighten the boundary line of a street was a natural consequence, to which no reasonable occupant would or did object.

In the case at bar the defendants accepted the survey. They accepted deeds which described their holdings by reference to the survey. The few feet of ground cut off in lining up the street (if any ground was cut off) they no doubt considered of too little value to merit litigation or even controversy. Their whole conduct supports this conclusion.

But now, after the lapse of some thirty years, when the mining town has grown to a city, and land values have immeasurably increased, they proceed to erect permanent and substantial buildings about four feet out into the street, beyond its platted line, shutting off the light and view of plaintiff and leaving him "in a hole," so to speak, though at the command of the city of Lewiston, through its engineer, he had erected a three-story brick building on the line of the True survey.

Out of the uncertainty of the forgotten past they have gathered a few facts dimmed by obscurity, upon which they hope to re-establish some ancient Indian trail as a substitute

for a street surveyed and platted by the official surveyor of the city, accepted, recorded, and unquestioned for thirty years.

If verbal lore and tradition are to prevail against official surveys, duly made, accepted, placed of record, and acquiesced in for thirty years, then any city established on a Government townsite is in peril of having its streets "jumped" and remodeled by any claimant who can muster old-timers and ancient history enough to indicate that he or his predecessor at one time in the dim past occupied the street with a flower garden, a cow-shed, or a dog-house, and without furnishing specific evidence of specific occupation of the specific ground claimed at the time and upon the day the laws of Congress vest equitable titles. Section 2 of Territorial Regulations declares that the occupation of streets at the time of the enforcement of the act shall not make or constitute them private property, but that notwithstanding such occupation they shall be streets and surveyed and established as such by the mayor-trustee. The map between pages 82 and 83 of the transcript proves that the mayor-trustee did his duty in surveying D street and making it of uniform width throughout.

In the first place, it must be observed that there is not a case cited by the State Supreme Court where the equitable titles vesting by force of the laws of Congress upon the entry of the townsite were confirmed by the trustee thirty years before the trial, wherein beneficiaries attempted to enforce, upon parol testimony, a trust in violation of the prior confirmations, accepted by their predecessors from the trustee in execution of the trust under the laws of Congress, and for the enforcement of which trust in conflict with the prior confirmations there is no regulation provided by the legislature of the Territory or State.

The fact, in the second place, must be noticed that none of the cases cited by the State Supreme Court involves the proposition of the court, without any regulation therefor, enforcing a trust in conflict with the confirmation of the

trust in a street to a city over thirty years before the trial, and therefore in conflict with the trust confirmed to the townsite occupant in and to a street as the street by the trustee was confirmed to the city. There is no case cited by the State Supreme Court to support its decision wherein there were facts similar to the foregoing or similar questions of law involved or decided. There is no question of ignoring a confirmation over thirty years old in any of the cases which are cited by the State Supreme Court.

In the case of Stringfellow *vs.* Cain, 9 Otto, 610, there was no question as to the validity of a confirmation considered at all, nor was the authority of the trustee to confirm in a certain way and manner discussed. In the case of Ashby *vs.* Hall, 119 U. S., 526, there never was a trust created by the laws of Congress between the trustee and his grantee, but the trust was between the trustee and the city of Helena, on the one hand, and the abutting property-owners, on the other hand, and the court enforced the trust upon the official survey.

The court in this case recognized and stated the power and authority of the trustee to ascertain and establish the nature and extent of the various trusts of which he was trustee and to confirm them to their owners according to the ascertainment and establishment. The court recognized the power and authority to execute and confirm the actual existing trusts. The ascertainment of the boundaries of D street was the establishment of the boundaries of an existing trust; it was the exercise of a lawful right, power, and authority conferred by the laws of Congress, and, as has been hereinbefore demonstrated, the trustee, being nothing but a human being, might have erred; but the error can at most be only voidable, to be corrected upon application of the party whose beneficial interests have been injured. This brings clearly to mind the force of the predecessors of the defendants in error accepting confirmation of their equities from the trustee upon his official survey and plat. The confirmation cannot be held to be absolutely void, be-

cause the trustee had authority and power to make some kind of a confirmation to the townsite occupants, wherein the existing street of the city would be ascertained and officially established as a part of the confirmation to the townsite occupants. So Ashby *vs.* Hall, *supra*, is no authority that the official survey of D street is absolutely void as to the land now claimed by the defendants in error, nor is it any authority that the official survey, under the facts and conditions, together with the plat made thereupon, is not a full, valid, final, and complete confirmation of D street to the city of Lewiston as surveyed, as well as to the plaintiff in error, setting at rest, forever, the question as to the nature and extent of his rights in and to D street, as surveyed, under the laws of Congress.

In the case of Goldburg *vs.* Kidd, 58 N. W., 575, it appears that in conveying the lot to Goldburg the trustee did not confirm any trust existing under the laws of Congress whatever, and, in so far as the case holds that a statute of limitation is void, it is in direct conflict with Cofield *vs.* McClellan, 16 Wall., 334, and is not and cannot be any authority for the State court deciding the case at bar against the plaintiff in error or holding that an official survey and ascertainment of a trust in the shape of a street is absolutely void, when the abutting owners upon such street received and accepted confirmation of their equities with reference to the establishment of the street by the trustee in the exercise of his lawful authority and power vested in him by the laws of Congress. The same criticism may be offered as to all the other cases cited by the State Supreme Court.

The facts in the case of Bingham *vs.* Walla Walla, 13 Pac., 408, make it inapplicable to the case at bar. There the townsite occupant when he accepted the confirmation of his rights upon the official survey had a positive understanding that his act did not constitute an agreement and consent to the land in the deed being taken as all that he was entitled to under the laws of Congress, but it was expressly agreed that he was to have pay for the 11 feet cut off into the street.

Conclusion.

The authority herein cited to establish the error of the State Supreme Court in the case at bar is conclusive. If the confirmation of the equitable titles of the parties to this action, under the facts in this case, established by written evidence which cannot be disputed, cannot stand, there is no confirmation that is worth one copper cent as a protection to people thirty years after the date of the confirmation, and townsite occupants can never do anything which becomes conclusive upon them; but they can at any time come into court and claim that the confirmation which they accepted was only confirmation of a part of their rights, and that therefore the courts should, upon parol testimony, confirm to them the other part of their right without an official survey simply because they can rely upon the claim that equitable rights under the laws of Congress might exist forever, if they claim a mistake in the confirmation to them by the trustee. *Such cannot be the law.*

Congress intended that there should be one confirmation, settling all equitable rights under the law, and never intended that the confirmation should be divided into two parts, or into many parts, to be executed at various times—a part by the courts and a part by the trustee.

This record establishes how uncertain must the question of the boundaries of the streets of Lewiston be if the decision is affirmed; it establishes the worthlessness of the confirmation of equitable titles by the trustee over thirty years before the trial. It furnishes the rule that the boundaries of the streets upon the original townsite must rest in parol evidence and that there is no evidence of their boundaries of record upon which purchasers can rely. It affords opportunity for disputes and furnishes the chance to outrage the private rights of the citizen. It is wrong for the city to make one man build upon the official line of D street and thereafter

the courts protect the maintenance of a nuisance, in the shape of new and permanent brick buildings, to his damage under the pretence of preserving and protecting equitable rights under the laws of Congress, which equitable rights were not confirmed to the claimants by the trustee, nor to their predecessors, and which equitable rights they cannot in a court of justice prove in the face of a confirmation which their predecessors knowingly accepted and received from the trustee in full performance of the trust existing between them and the trustee and from which confirmation the land now claimed was knowingly omitted by the beneficiaries and the trustee.

We respectfully submit that we have shown to the court the error made by the trial court and the State appellate court in not having given a proper construction to the Federal laws and territorial regulations passed by virtue of those Federal laws; and, having so shown, we respectfully submit that this honorable court should reverse the decision of the said Supreme Court and return the case to the Supreme Court of the State with directions that it in turn return the case to the trial court with directions to enter a decree granting the plaintiff the rights for which he has prayed and to which he is entitled under the law.

Respectfully submitted,

H. WINSHIP WHEATLEY,
Attorney for Plaintiff in Error.

BEN F. TWEEDY,
Of Counsel.

SUMMARY OF CITATIONS.

Federal Questions.

The record presents Federal questions which can be reviewed upon writ of error to the State Supreme Court of the State of Idaho, inasmuch as that court decided that section 2387 of the Revised Statutes of the United States made the official survey of Congressional grants and the confirmation thereupon void because not a proper and lawful execution of the trusts as required by said section 2387, *supra,* and thereupon, upon parol testimony, attempted, in the execution of the trusts under section 2387, *supra,* to ascertain, establish, and confirm to the defendants in error, against the rights of the plaintiff in error, a part of D street in direct conflict with the confirmations accepted by the predecessors of all the parties to this action in the year of 1875 upon the official survey by the mayor-trustee (Transcript, pp. 117 to 131, inclusive).

AUTHORITY.

Dunton *vs.* Muth, 45 Fed., 390-395, and authority cited.
Ashby *vs.* Hall, 119 U. S., 526.
Maguire *vs.* Taylor, 1 Black (U. S.), 196.
City of Carondelet *vs.* City of St. Louis, 1 Black (U. S.), 179.
McDonough *vs.* Millandon (U. S.), 11 L. Ed., 786-794.
Mobile Transportation Co. *vs.* Mobile, 187 U. S., 479.
Green Bay & Miss. Canal Co. *vs.* Pattern Paper Co., 172 U. S., 58.
Hussman *vs.* Durham, 165 U. S., 144.
Northern Pacific R. Co. *vs.* Colburn, 164 U. S., 383.
Shively *vs.* Bowlby, 152 U. S., 1.
Pickering *vs.* Lomax, 145 U. S., 310.
Anderson *vs.* Carkins, 135 U. S., 483.
Neilson *vs.* Lagow, 7 How (U. S.), 772.
Chouteau *vs.* Eckhart, 2 Howard (U. S.), 334.
Pollard Heirs *vs.* Kiebbe, 14 Pet., 353.

Wallace *vs.* Parker, 6 Pet., 680.
Ross *vs.* Barland, 1 Pet., 655.
Kaukaman Water Power Co. *vs.* Green Bay, etc., Co., 178 U. S., 254.
Stanley *vs.* Schwalby, 162 U. S., 255.
Hammond *vs.* Whittridge (U. S.), 51 L. Ed., 606.
Lavagnmo *vs.* Uhlig, 198 U. S., 443.
Leigh *vs.* Green, 193 U. S., 77.
Boise City *vs.* Flanagan (Idaho), 53 Pac., 453.
Ming *vs.* Foot (Mont.), 23 Pac., 515.
Anderson *vs.* Bartels (Colo.), 3 Pac., 225.
Almonester *vs.* Kenton, 9 Howard, 1.
Mackey *vs.* Dillon, 4 Howard (U. S.), 419.
Dower *vs.* Richards, 151 U. S., 658.
Hussey *vs.* Smith, 99 U. S., 9 Otto, 20.
Cofield *vs.* McClellan, 16 Wall., 331.
Stringfellow *vs.* Cain, 9 Otto, 610.

APPLICATION OF AUTHORITY.

See argument in this brief, on pages 21 to 28, inclusive.

The Nature of the Grant.

The official survey of the townsite is a necessary, essential part of the confirmations accepted in 1875 by the predecessors of the parties to this action, and the trust under section 2387 of the Revised Statutes of the United States is nothing but the ascertainment, establishing, and surveying of the townsite, and upon that ascertainment and establishment confirming the several Congressional grants brought into existence by section 2387, *supra*, to their respective owners in equity, and to thus execute the several trusts section 2387, *supra*, confers upon the trustee the power and authority, under regulations therefor provided by the State or Territory, to ascertain the metes and bounds, establish and confirm them, and to merge into written and documentary evidence all parol evidence of the boundaries of each of the aforesaid Congressional grants resting in equity, and, therefore, when the townsite occupants accept deeds from the trustee in performance and execution of the trust under section 2387, *supra*, and in confirmation of all their equitable

rights under section 2387, *supra,* they can never thereafter, in a court of law or equity, claim that they ought to have had another and different confirmation, and that all their equitable rights under section 2387, *supra,* had not been confirmed to them; so the official survey and the confirmation thereupon become the exclusive, conclusive, and only evidence of not only their legal rights, but all their equitable rights under section 2387 of the Revised Statutes of the United States, and the State courts committed grave error against the plaintiff in error when they admitted and considered, over his objections, other evidence of the boundaries of D street than the official survey and confirmations thereupon to establish equitable rights under section 2387, *supra,* in conflict with the official survey and confirmation, and in 1905 attempting to overthrow an official survey made in 1874, and upon which in 1875 all the predecessors of the parties to the action at bar received and accepted confirmation of their equitable rights as they vested under section 2387 aforesaid of the Revised Statutes of the United States of America. In so far, therefore, as the findings of fact of the State courts are based upon parol testimony as to the south line of D street, they are not binding upon the plaintiff in error and he has a perfect right to rest his case upon this writ of error upon the documentary, indisputable evidence in the record and upon the official survey and the accepted confirmations, essentially and necessarily resting for legal existence upon the validity of the official acts of the trustee under section 2387, *supra.*

AUTHORITY.

Smith *vs.* Pipe, 3 Colo., 187, and authority cited.
State *vs.* Wobster (Mont.), 72 Pac., 295.
Ming *vs.* Foote (Mont.), 23 Pac., 515.
Anderson *vs.* Bartels (Colo.), 3 Pac., 225.
Polk's Lessee *vs.* Wendal, 9 Cranch., 87.
Moore *vs.* Walla Walla (Wash. Ter.), 2 Pac., 187.
Boise City *vs.* Flanagan (Idaho), 53 Pac., 453.
Laughlin *vs.* City of Denver (Colo.), 50 Pac., 917.
Ashby *vs.* Hall, 119 U. S., 526.
Cofield *vs.* McClellan, 16 Wall., 334.
Newhouse *vs.* Simino, 3 Wash., 648-652.
Cragin *vs.* Powell, 128 U. S., 691.
City of Cardonelet *vs.* City of St. Louis, 66 U. S., 179.

Galt *vs.* Galloway, 29 U. S., 332.
Haydol *vs.* Dufresne, 58 U. S., 23.
Greer *vs.* Mezes, 65 U. S., 268.
Harrington *vs.* Boehmen (Cal.), 66 Pac., 214.
Whiting *vs.* Gardner (Cal.), 22 Pac., 71.
Martin *vs.* Carlin, 19 Wis., 454.
McEvoy *vs.* Clark, 31 Wis., 142.
Campbell *vs.* Clark, 8 Mo., 553.
Greer *vs.* Squier, 9 Wash., 359.
Amador County *vs.* Gilbert (Cal.), 65 Pac., 130.
Parchen *vs.* Ashby (Mont.), 1 Pac., 204.
Section 3, Territorial Act of Idaho.
Section 9, Territorial Act of Idaho.
Sections 2, 3 & 4, Territorial Act of Idaho.
Watkins *vs.* Havighorst, 74 Pac., 318.
Stoneroad *vs.* Stoneroad, 158 U. S., 240.

And it had as well been held in the case of a townsite that Congress intended an official survey under regulations of the State or Territory in order to designate and fix the boundaries of the several Congressional grants brought into existence under section 2387 of the Revised Statutes of the United States upon entry of the townsite, in order to separate the grants from each other, that confirmation as separated might be given by the trustee, acting as an officer of the United States in the enforcement of a trust created by section 2387, supra, and that the rules of law relating to an official survey by the officers of the Land Department of the United States apply with equal force to the survey of the trustee; and we cite:

West *vs.* Cochran, 17 How., 403.
Central Pacific R. Co. *vs.* Nevada, 162 U. S., 526.
Clemmons *vs.* Gillette, 83 Pac., 879.
United States *vs.* Birdseye (C. C. A.), 137 Fed. Rep., 516.
Robinson *vs.* Forest, 29 Cal., 325.
Territory *vs.* Persons, 76 Pac., 316.
Maguire *vs.* Tyler, 8 Wall., 650; 19 L. Ed., 320.
Ledoux *vs.* Black, 18 How., 473; 15 L. Ed., 457.
Menard's Heirs *vs.* Massey, 8 How., 301; 12 L. Ed. 1085.
Tubbs *vs.* Wilhoit, 11 Sup. Ct. Rep., 279.
United States *vs.* Curtner, 38 Fed., 1.
Denver *vs.* Kent, 1 Colo., 336.

The foregoing cases establish the absolute necessity of an official survey upon which the legal title, corresponding to the equitable title, vesting upon the entry of the townsite under section 2387, supra, might pass from the trustee, who is an officer of the United States for the confirmation of the equitable titles, to the owners of the equitable titles, and they further illustrate the principle that the State Supreme Court cannot upon parol evidence, after confirmation by the trustee without an official survey of that land claimed by the defendants in error as private property to be confirmed to them, even attempt to enforce any trust under the said section 2387, supra, when the land has remained surveyed as a part of a street for over thirty years without an attempt on the part of any one to have the land claimed surveyed officially as private property; and, furthermore, the foregoing cases demonstrate that it was never the intention of Congress to have confirmation of equitable titles by "parcels," one part by the trustee and the other part by the court, and that without the land claimed by the defendants in error being surveyed as private property officially by the trustee, the court is without jurisdiction to enforce any trust under section 2387 of the Revised Statutes of the United States.

Lobe *vs.* Butte General Electric Co. (Mont.), 39 Pac., 912.
Hershfield *vs.* Rockey, etc., Co. (Mont.), 29 Pac., 882.
Kenyon *vs.* Knipe, 2 Wash., 394.
Hardin *vs.* Jordan, 140 U. S., 371.
Abraham *vs.* Ordway, 158 U. S., 416.
Penn. Mutual L. Ins. *vs.* Austin, 168 U. S., 685.
Galliher *vs.* Cadwell, 145 U. S., 368.
Cook *vs.* Barrett (Mass.), 29 N. E., 625.
Lutjen *vs.* Lutjen (N. J. Eq.), 53 Atl., 625.

FURTHER APPLICATION OF AUTHORITY.

See argument in this brief, pp. 29 to 42.

The Nature of the Grant Further Considered and the Remedy.

The occupation of a part of the officially surveyed, established street in conflict with the official survey and the accepted confirmation upon the official survey by the predecessors of the parties to this action, is the maintenance of a public and private nuisance and can be abated by the plaintiff in error, however long continued, in order to protect his rights of equity merging in the confirmation accepted by his predecessor under section 2387 of the Revised Statutes of the United States, as by section 2387, *supra*, he is the owner of private rights in the street appurtenant to his lot.

Authority.

Woodrull *vs.* Mining Co., Sawy., 513-517; 18 Fed., 753.
Mills *vs.* Hall, 9 Wend., 315.
McLean *vs.* Llewellyn Iron Works (Cal.), 83 Pac., 1083.
Laughlin *vs.* City of Denver, *supra*.
Moore *vs.* Walla Walla, *supra*.
Boise City *vs.* Flanagan, *supra*.
Dooly Block *vs.* St. Lake, etc., Co. (Utah), 33 Pac., 229.
Grogan *vs.* Haywood, 6 Sawy. (U. S.), 488.
Simplot *vs.* Chicago, etc., R. Co., 5 McCreary (U. S.), 158.
First National Bank *vs.* Tyson (Ala.), 32 So., 144.
Beaver *vs.* Baltimore, etc., Co., 58 Atle., 21.
Healy *vs.* Kelly, 54 Atl., 588.
Ashby *vs.* Hall, 119 U. S., 526.

Application of Authority and Citation of Other Authority.

See argument on pp. 43 to 45¾, inclusive, of this brief.

The Application of the Townsite Laws to This Case.

The State Supreme Court misapplied the cases cited in its opinion to the facts in the case at bar and thereby overthrew the indisputable documentary evidence of the rights of the plaintiff in error under section 2387 of the Revised Statutes of the United States, upon the ground that the acts of the trustee in confirmation of the equitable rights of the parties to this action were void by force of the proper construction of section 2387, *supra*, and failed to not notice that in the case of Ashby *vs.* Hall, 119 U. S., 526, the court did not declare the official survey void, but enforced the rights of the parties upon the official survey, simply holding that there was no trust to be confirmed to the purchaser of the alley, but a trust to be confirmed to the owners of abutting property upon the alley, and which he did confirm upon executing deeds to them upon the official survey, since his survey of the alley was for their benefit, whatever he designated it upon the plat. The official survey of D street was for the benefit and use of all abutting property as surveyed and established, and the owners of such abutting property when they accepted their deeds consented to such use of the street as surveyed, and the boundaries cannot be changed by parol evidence in 1907, so many years after confirmation.

Moore *vs.* Walla Walla, *supra.*
Boise City *vs.* Flanagan, *supra.*
Laughlin *vs.* City of Denver, *supra.*
Dooly Block *vs.* St. Lake, etc., Co., *supra.*
Hall *vs.* Bryfogele, 70 N. E., 883.
Woolfe *vs.* Sullivan (Ind.), 52 N. E., 1018.

And the right of use and benefit extend to adjoining property.

First National Bank *vs.* Tyson, *supra.*
Healy *vs.* Kelly, *supra.*
Tilly *vs.* Mitchell & Lewis Co., 98 N. W., 969.
Beaver *vs.* Baltimore, etc., Co., *supra.*
Ashby *vs.* Hall, *supra*, and an authority cited to support second point of law, *supra.*

See argument on pages 54 to 58 of this brief.

The questions to be argued arise upon the fact that the State courts, over the objections of the plaintiff in error, admitted parol testimony to overthrow and annul the official survey of D street and to destroy the confirmation of the rights of the plaintiff in error in and to D street of the city of Lewiston, contrary to and in violation of his rights under section 2387 of the Revised Statutes of the United States, and in violation of all the rules of law protecting official surveys upon which there has been confirmation of Congressional grants under the laws of Congress, whereby the State Supreme Court decided adversely to the rights of property which the plaintiff in error claims under the said section 2387, and also decided adversely to the authority of the townsite trustee, which the plaintiff in error asserts he had under the aforesaid section 2387, and upon which authority of the trustee of the Lewiston townsite the plaintiff in error claims a complete protection of his rights under section 2387 of the Revised Statutes of the United States against the pretended equities of the defendants in error.

Transcript, pp. 49, 57, 58, 75, 77, 80, 83, 84, 97, 100, 106 to 112, inclusive, and 117 to 131, inclusive; pp. 1 to 6, inclusive, and answer asking annulment of confirmations, pp. 6 to 24.

The validity, force, and legal effect of an official survey and the confirmation of equitable titles vesting under section 2387 of the Revised Statutes of the United States are before the court to determine whether the laws of Congress make the official survey and confirmation absolutely void, so that the plaintiff in error has no private property in D street as it was officially ascertained, established, and surveyed by the mayor-trustee over thirty years before the trial in the action at bar.

Respectfully submitted,

H. Winship Wheatley,
Attorney for Plaintiff in Error.

Ben. F. Tweedy,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1908.

CASE NO. 197.

MATTHEW SCULLY,
Plaintiff in Error,

vs.

JOHN M. FIX, LOUISE SQUIER, and JOHN Q. MOXLEY,
Defendants in Error,

MOTION TO DISMISS WRIT OR ERROR.

JAMES H. FORNEY,
Residence and Postoffice Address, Moscow, Idaho.

ISHAM N. SMITH,
Residence and Postoffice Address, Lewiston, Idaho,
Attorneys for Defendants in Error.

Now come the defendants in error by their counsel and move this Honorable Court to dismiss the writ of error hertofore issued herein, and base their motion upon the following grounds, to-wit:

1.

That the constitutionality of no statute, state of Federal, is involved in this case.

2.

That no question of Federal law was presented to, involved in, or necessary to the decision of this case in the state court.

3.

The record affirmatively shows a decision upon questions other than federal questions sufficiently broad to support the decision and judgment of the Supreme Court of Idaho, without regard to any federal question (if any there be) which might otherwise be involved.

4.

The record shows the only question involved in this case to be one relating to boundary lines of lands.

5.

The plaintiff in error does not claim that the lands in controversy were ever used as a street, nor that he was ever the owner or in the possession of any part thereof, or in the enjoyment of any rights flowing from the lands in controversy which rights are sought to be claimed herein.

6.

The decision and judgment of the Supreme Court of Idaho are sustainable upon the question of limitations alone.

7.

The plat of survey upon which plaintiff in error relies was amended more than thirty years prior to the institution of this action.

8.

The Federal question attempted to be raiesd by the writ of error was not claimed nor set up by the plaintiff in error in the state courts in such a manner as to entitle this Court to review it."

This motion will be submitted upon the record in error filed in this Court.

James H. Hawley.,
Residence and Postoffice Address Moscow, Idaho.

Dohan N. Smith.,
Residence and Postoffice Address Lewiston, Idaho.
Attorneys for Defendants in Error.

MATTHEW SCULLY,
Plaintiff in Error,

vs.

JOHN M. FIX, LOUISE SQUIER, and
JOHN Q. MOXLEY,
Defendants in Error,

NOTICE OF MOTION.

To Matthew Scully, Esq., Plaintiff in Error, and to Hon. Ben. F. Tweedy and Hon. H. Winship Wheatley, his attorneys and counsel in said cause:

You and each of you will please take notice that the undersigned will on the ....21..... day of .....Dec....., A. D. 1908.. on the opening of the above entitled court, in the court room thereof in the city of Washington in the District of Columbia, or as soon thereafter as counsel can be heard, submit the annexed motion and the accompanying brief.

Dated this the ....31..... day of October, 1908.

JAMES H. FORNEY and
ISHAM N. SMITH,
Attorneys for Defendants in Error.

.....James H. Forney.....,
Residence and Postoffice Address Moscow, Idaho.

.....Isham N. Smith.....,
Residence and Postoffice Address Lewiston, Idaho.
Attorneys for Defendants in Error.

MATTHEW SCULLY,
Plaintiff in Error,

vs.

JOHN M. FIX, LOUISE SQUIER, and JOHN Q. MOXLEY,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

BRIEF FOR DEFENDANTS IN ERROR ON MOTION TO DISMISS WRIT OF ERROR.

JAMES H. FORNEY,
Residence and Postoffice Address, Moscow, Idaho.

ISHAM N. SMITH,
Residence and Postoffice Address, Lewiston, Idaho.
Attorneys for Defendants in Error.

STATEMENT OF FACTS.

The motion states the following grounds for dismissal.

1.

That the constitutionality of no statute, state or federal, is involved in this case.

2.

That no question of federal law was presented to, involved in, or necessary to the decision of this case in the state court.

3.

The record affirmatively shows a decision upon questions other than federal questions sufficiently broad to support the decision and judgment of the Supreme Court of Idaho, without regard to any federal question (if any there be) which might otherwise be involved.

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The decision and judgment of the Supreme Court of Idaho are sustainable upon the question of limitations alone.

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The plat of survey upon which plaintiff in error relies was amended more than thirty years prior to the institution of this action.

8.

The Federal question attempted to be raised by the writ of error was not claimed nor set up by the plaintiff in error in the state courts in such a manner as to entitle this Court to review it."

This suit was for an injunction to restrain the defendants in error from erecting certain business blocks in Lewiston, Idaho, and occupying therewith lands out to their former lines of occupancy which had been from time immemorial the south line of D Street in Lewiston, Idaho.

The City of Lewiston was incorporated under the laws of Washington Territory by Act of December 20, 1861. Thereafter the Territory of Idaho was organized in 1863, and thereafter Lewiston, Idaho, was incorporated under the laws of Idaho by Act approved January 15, 1863, and was reincorporated in 1866. (R. 121-122).

Thereafter by Act of Congress the Federal townsite law was enacted by Act of March 2, 1867, Statute 177, 14th Statutes at Large, same being Section 2387 R. S. U. S., set forth and commented upon in Federal Statutes Annotated, Vol. 6, P. 344 et seq.

Thereafter in 1871 Declaratory Statement No. 39 was made by the Mayor Trustee of the City of Lewiston in the United States Land Office at Lewiston, proposing to enter the lands included within her corporate borders in trust for the inhabitants thereof, claiming settlement in 1861. (R. 122).

In 1873 the Territorial Legislature, by Act approved January 8, provided for the survey, platting and disposal of land in Lewiston, Idaho, pursuant to such statutes, which contain, *Inter Alia* the following provisions:

> "The said Mayor-Trustee shall at the time also cause to be made and filed in his office by a competent person a plat of the said land divided into blocks and lots to such an extent as may be deemed requisite by said Mayor-Trustee, and at his discretion the exterior lines of the remaining part of said land shall be run, marked and platted on the plat; which shall be approved by said Mayor-Trustee and his approval shall be endorsed thereon, with the date of the approval over the signature of said Mayor-Trustee, and the said Mayor-Trustee shall cause immediately thereafter, the said plat to be recorded in the records of Nez Perce County, Idaho Territory, in accordance with the law or laws governing the record of deeds of conveyance of real estate in said Idaho Territory.
>
> Sec. 2. That the streets, lanes, alleys and other rights of way which may be in common use at the time of the enforcement of this act, within the said city, over the lands described in the aforesaid patent, are hereby declared to be public highways, for the use and benefit of the inhabitants of the said city in common, and that the survey and platting of the said land into blocks and lots, acres or parts of the same shall conform thereto. That the survey and platting of the land described in the aforesaid patent for the City of Lewiston, shall be so as to divide the blocks into lots to be, whenever practicable, each fifty feet in width and one hundred feet in depth, and the fractional block or blocks, lot or lots, acre or acres, shall be so arranged and adjusted as to conform to the condition of the improvements and occupation at the time of the enforcement of this Act. That where streets, alleys, roads or other rights or way have obtained, may have been reserved or claimed by the inhabitants in common of the said City, as streets, alleys, roads or other rights of way, and may be occupied at the time of the enforcement of this act by individuals, are hereby declared to be public highways for the purposes, use and benefit of the inhabitants of said City of Lewiston, in common."

Thereafter a survey was made by E. B. True; plat was filed (R. 28) and thereafter it was ascertained that the surveyor had platted as part of D Street about four feet, more or less, of the holdings of the occupants of lands bounded on the north by the south side of D Strett; that the line as delineated by the surveyor, had

been run through buildings, premises and lands then in the actual occupancy of persons, one of which said buildings was standing at the time of the trial; that such surveyor paid no heed or regard to the occupancy of the individuals affected by his erroneous lines, but ran such line regardless of vested property rights, and sought thereby to create a street where none had ever existed before; to deprive persons of their occupancy and vested rights in property, and to convert private property into public streets against the consent of the occupants. (Findings of Trial Court, Record P. 19-20). This finding was sustained by the Supreme Court of Idaho. (Record, P. 123; P. 125; P. 126; Pp. 130-131).

The plat made by E. B. True was dated June 24, 1874, approved June 22, 1875, but was not recorded until July 1 1879. (Record, map at P. 28 with endorsements.)

Notwithstanding this erroneous survey, the various citizens claiming to the line of D Street as established by occupancy held possession of their entire lots (Findings, Record Pp. 19-20. Decision of Supreme Court, Record Pp. 123-125, 126, 130, 131) and applied for and were given deeds in accordance with their holdings although this required an amendment of the survey as to the description of lots and the specifications of the areas embraced therein. The lower court found, and the Honorable Supreme Court sustained the findings, that the plat of survey was amended before recording. (R. Pp. 17, 18, 19).

The Court found the south line of D Street to be as claimed by the defendants in error, also that the survey and delineation thereof by E. B. True were erroneous in the particulars heretofore named. (R. Pp. 19, 20, 21.)

The immediate facts leading to this controversy are that in Block Twenty-four of the City of Lewiston the line of occupancy had extended to the south line of D Streets as established by user, which line so established extended approximately four feet further north than the line delineated on the map of E. B. True.The plaintiff in error, Matthew Scully, having previously constructed a three-tsory brick building on his ownings, Lot Six of Block Twenty-four, built only as far north as the line established by E. B. True as the south line of D Street. The defendants in error were afterwards constructing other modern brick buildings on their lands and possessions and in so doing were covering the exact lands which themselves and their predecessors had continuously, openly and notoriously occupied since prior to the entry of the City of Lewiston under the Federal townsite acts. (Record, Pp. 22, 23; also Pp. 20,21).

These findings just referred to were sustained by the Supreme

Court (Record, P. 126), in which the Honorable Supreme Court of Idaho says:

> "There is no dispute in the evidence but that the defendants and their predecessors in interest claimed and occupied the lots in question to their full length. Buildings and other improvements had entirely covered the said lots. The owners occupied and possessed said lots fifty feet in length. It is not claimed or shown that any part of said lots were ever used as a street or any part thereof, nor that the City ever claimed any part thereof as a portion of the streets, and the City Surveyor cannot make any portion of said lots a street by simply making a plat and indicating on such plat that said lots were only forty-five or forty-six feet in length. * * * The appellant rests his case here upon the making and approval of said plat. * * * The City of Lewiston is not here complaining of the erection of buildings on the lots referred to in her streets. The record clearly shows that the City has for forty-five years known that the occupants of the lots in said Block Twenty-four were claiming that such lots were fifty feet in length and that they had buildings and other improvements covering said lots."

On the foregoing facts the defendants in error contend that the only question involved in this case is one of

THE BOUNDRY LINE OF PROPERTY.

This being true, the motion to dismiss the writ of error is based upon the ground that such a question is not sufficient to vest jurisdiction in this Honorable Court.

It has been so frequently ruled by this Honorable Supreme Court that a mere question of boundary does not vest jurisdiction in the Supreme Court of the United States to review the adjudication of a state tribunal that we quote from one decision only and cite the other authorities.

Telluride Power Transmission Co. vs. Rio Grande & Western Ry. Co., 175 U.S. 639 44 L. 305

decided January 8, 1900, Mr. Justice Brown uses the following language at the close of his opinion:

> "But the difficulty in this case is that before it could be said that any right or title under a statute of the United States had been denied, it was necessary to establish as a question of fact priority of possession on the part of the Telluride Company as well as conformity to local customs, laws and decisions. These were local and not federal questions. The jurisdiction of this

court in this class of cases does not extend to questions of fact or of local law which are merely preliminary or the possible basis of a federal question.

The write of error must therefore be dismissed."

See also

Moreland vs. Page, 20 Howard, 523;

McDonough vs. Milandon, 3 Howard, 693;

Lanfear vs. Hunley, 4 Wallace, 204;

Almonester vs. Kenton, 9 Howard, 1;

Doe, ex den, Farmers' Heirs, vs. Eslava et al. 9 Howard, 420;

Doe, ex den, Farmer's Heirs, vs. The City of Mobile, et al., 9 Howard 450.

The pleadings in this case to-wit, the complaint and answer (R. Pp. 1-17), together with the Findings, Conclusion and Decree (R. Pp. 17-24), which were sustained by the Supreme Court of the State of Idaho (R. Pp. 117-131), affirmatively show that the sole question involved here is in the location of the boundary of lots upon the ground. This location was to have been made under the directions of the local laws of Idaho. The record shows the line of D Street to have been established by user long prior to the survey of E. B. True, and such line was established as that claimed by defendants in error. Upon the location of the south line of D Street this entire controversy depends, and because that location is a question of fact we respectfully submit it does not embrace one of federal cognizance.

The foregoing authorities, we submit, are conclusive of grounds 2 and 4 of the motion which are as follows:

"2. That no question of federal law was presented to, involved in, or necessary to the decision of this case in the state court."

"4. The record shows the only question involved in this case to be one relating to boundary lines of lands."

This view is strengthened when the nature of the title involved is considered. The settlers upon the lots embraced within th City of Lewiston who occupied them at the time of the entry of the townsite derived their title by virtue of such occupancy and use. The Mayor-Trustee got no title to these lands except in trust and neither he nor his engineer conveyed any title to the occupants of lands. The Mayor-Trustee in virtue of his authority could only confirm the title of the occupants. The defendants in error and their predecessors do not claim their land by virtue of the deeds from the Mayor-Trustee nor of the survey by the surveyor. Their ownership

was already in existence when this survey was made. The nature of their previous ownership as recognized in the Act of Congress for the relief of inhabitants, etc., etc. (Federal Townsite Act, supra), and as confirmed by the subsequent deeds is accurately described in Blackstone as follows: (Book 2, Page 310):

> "Of conveyances by the common law some may be called original or primary conveyances, which are those by means whereof the benefit or estate is created or first arises; others are derivative or secondary; whereby the benefit or estate originally created is enlarged, restrained, transferred or extinguished. Original conveyances are the following: 1. Feoffment; 2. Gift; 3. Grant; 4. Lease; 5. Exchange; 6. Partition. Derivatives are, 7. Release; 8. Confirmation; 9. Surrender; 10. Easement; 11. Defeasance."

This classification shows that when these original settlers took possession of these lands and thereafter the Act of Congress (Townsite Act) was passed,—a striking analogy to "Feoffment" same being the original means "whereof the benefit or estate was first created or arises" was in existence. Thereafter the survey having been made in trust for these feoffees the deed executed by the Mayor-Trustee was a secondary (not primary) canveyance, (Blackstone, Book 2, P. 325)" * * whereby a voidable estate is made sure and unavoidable or whereby a particular estate is increased."

In Goldberg vs. Kidd, 58 N. W., 574 (576-577) it is said:

> "As to the lots already occupied when the entry was made we think the word "disposal" must be construed to mean "distribution," which words are often used synonymously, for as to such lots they were already disposed if; that is, they became at once the property equitably of the occupants."

See also

City of Pueblo vs. Budd, 36 Pac., 599;
Coefield vs. McClellan, 16 Wall., 334;
Stringfellow vs. Kane, 99 U. S., 610;
Towne Co. vs. Maris 11 Kan., 128-151;
Rathbone vs. Sterling, 25 Kan., 333; (By Mr. Justice Brewer).
City of Helena vs. Albatross, 20 Pac., 817;

For these reasons, it is respectfully submitted that this Court has no jurisdiction of this controversy.

QUESTIONS OTHER THAN FEDERAL.

Point three of the motion to dismiss is:

> "The record affirmatively shows a decision upon questions other than federal sufficiently broad to support the decision and judgment of the Supreme Court of Idaho, without regard to any federal question (if any there be) which might otherwise be involved."

Point 5:

> "The plaintiff in error does not claim that the lands in controversy were ever used as a street, nor that he was ever the owner or in the possession of any part thereof, or in the enjoyment of any rights flowing from the lands in controversy which rights are sought to be claimed herein."

Point 6:

> "The decision and judgment of the Supreme Court of Idaho are sustainable upon the question of limitations alone."

Point 7:

> "The plat of survey upon which plaintiff in error relies was amended more than thirty years prior to the institution of this action."

AMENDMENT OF THE PLAT.

The answer (R. 14; Fol. 35) reads:

> "That thereafter, and notwithstanding the said survey of E. B. True—the said plat was amended as these defendants are informed and believe and so state, so that in red ink thereon, there appears a true and correct south line of "D" Street, conforming to the several use and occupancy of the said lots referred to in the complaint, as the same are now and were long prior thereto, and have always been used, and possessed and occupied by the defendants and their predecessors in interest."

Upon this issue the trial court found: (Record P. 21, Fol. 52; Finding 13).

> "That thereafter, and prior to the filing of the said map or plat of E. B. True, the same was amended in many particulars and that such amendments are shown on said plat by red lines; that the south line of "D" Street as originally shown on said plat is shown by a black line, and that north of the same, there is placed a red line, both on the original and on the recorded

copy thereof; that in the deed to John Q. Moxley of what is called Lot Three (3), Block Twenty-four (24), is a recital of a conveyance of said Lot Three, Block Twenty-four "with an amendment;' and that the City of Lewiston, with full knowledge of the facts set forth, and of the claim of the predecessors in interest of the defendants of the location of the correct line of "D" Street, established by use and occupancy as the south line of "D" street, has never at any time molested or attempted to molest the defendants or their predecessors in interest, in their rights to the said property claimed by them, nor has it ever claimed the same as street, nor has such portion ever been used as street; but that the said City of Lewiston, with knowledge of the facts, has acquiesced in the user thereof as stated, and has accepted the south line of "D" Street as the line established by user, etc., etc."

This finding by the trial court was sustained by the Supreme Court of Idaho at Page 125, Folio 283, as follows:

"The rights of the occupants had attached prior to True's survey, and the entry of the townsite was made in trust for the occupants who were in possession of particular tracts of land as well as for the community in general."

Also Record, Page 125, Fol. 286, as follows:

"In this case the occupants had property rights in the premises occupied by them, and the surveyor had no authority to take private property for street purposes or to establish any portion of a street on private property. The occupants' right and ownership did not come by virtue of the plat and survey; it came by reason of his possession and occupancy and the improvements that he had placed upon his lot."

Also at Page 126, Fol. 287:

"There is no dispute in the evidence but that the defendants and their predecessors in interest claimed and occupied the lots in question to their full length. Buildings and other improvements had entirely covered the said lots. The owners occupied and possessed said lots fifty feet in length. It is not claimed or shown that any part of said lots were ever used as a street, or any part thereof,nor that the city ever claimed any part thereof as a portion of the street, and the city surveyor cannot make any portion of said lots a street by simply making a plat and indicating on such plat that said lots were only forty-five or forty-six feet in length."

Page 126, Fol. 287:

> "The City of Lewiston is not here complaining of the erection of buildings on the lots referred to in her streets. The record clearly shows that the city has for forty-five years known that the occupants of the lots on said Block 24 were claiming that such lots were fifty feet in length and that they had buildings and other improvements covering said lots.

Page 126, Fol. 287:

> "We think it sufficiently appears from the evidence that the lots in question were occupied, claimed and possessed ever since long before the application was made to enter said land, either by the present owners or their predecessors in interest, and as heretofore stated, it also appears that they claimed their said lots to be fifty feet in length, and that they or their predecessors have had improvements of some kind covering said entire fifty feet. That being true, the counsel's contention is fully met by the proof in the case."

The above quotations show that the following questions of fact were decided by the trial court, and sustained by the Supreme Court of Idaho adversely to the plaintiff in error; namely,

1. The plat of E. B. True was amended and the south line of "D" Street was represented on said plat in red ink, making such south line conform to the actual occupancy of the defendants in error and other persons along said street. (See map Page 28, red lines on "D" Street).
2. No part of the lands in controversy were ever used as street.
3. The City of Lewiston does not claim it as a street.
4. The plaintiff in error has never enjoyed any rights to ancient lights, air or view or other rights from the lands in controversy nor from the fact that they were ever a part of any street.
5. This condition has existed since prior to the entry of the City of Lewiston under the Federal townsite act.

The above, we respectfully submit, are purely questions of fact and being broad enough to sustain the decision of the trial court as well as the Honorable Supreme Court of the State of Idaho without regard to any Federal question which may or may not be injected into the case, such questions of fact are determinative that this Honorable Supreme Court of the United States has no jurisdiction whatsoever of this cause.

In Chapman & Dewey Land Co. vs. Bigelow, 260 U. S., Page 41, (Book 51, Law Ed. 953), Point 2 of the syllabus reads:

"The decisions of state courts upon questions of fact are not reviewable by writ of error to those courts from the Supreme Court of the United States."

And in the opinion proper Mr. Chief Justice Fuller voicing the unanimous sentiment of the Court, says:

"In view of the decisions of this Court in Horne vs. Smith, 159 U. S., 40, 40 L. Ed. 68, 15 Sup. Ct. Rep. 988; Niles v. Cedar Point Club, supra; Kean v. Calumet Canal & Improv. Co., 190 U. S. 452, 47 L. Ed. 1134, 23 Sup. Ct. Rep. 651; Iowa v. Rood, 187 U. S. 87, 47 L. Ed 86 23 Sup Ct. Rep. 49; and other cases and of the findings of the court below, we are of opinion that the jurisdiction of this court to revise the conclusions of that court cannot be maintained. Moreland v. Page, 20 How., 522, 15 L. Ed. 1009; Lanfear v. Hunley, 4 Wall., 204, 18 L. Ed. 325; Dower v. Richards 151 U. S. 658 38 L. Ed. 305, 14 Sup. Ct. Rep. 452; Eagan v. Hart, 165 U. S. 188, 41 L. Ed. 680, 17 Sup. Ct. Rep. 300; Israel v. Arthur, 152 U. S. 355, 38 L. Ed. 474, 14 Sup. Ct. Rep 583; Hardin v. Shedd, 190 U. S., 508, 47 L. Ed. 1156 23 Sup. Ct. Rep. 685; Romie v. Casanova 91 U. S. 379, 23 L. Ed. 374

The result is unaffected by the exclusion from the evidence of a letter written by the Secretary of the Intrior to th Commissioner of the General Land Office, November 17, properly rejected, and the ruling presented no Federal question.

Writ of error dismissed."

Under the above authorities the defendants in error respectfully submit that these questions, other than Federal, which were adjudicated in the courts of Idaho are determinative of this issue, because if the line established by E. B. True was in fact amended to conform to the line of occupancy contended for by defendants in error that is the end of all controversy here. Questions of fact, decided by the state courts not being of Federal cognizance, but being sufficiently broad to determine the issues, the defendants in error respectfully direct this Honorable Court's attention to the following proposition:

"Where the highest court of a state in rendering judgment decides a Federal question and also decides against the plaintiff in error upon an independent ground not involving a Federal question and broad enough to support the judgment, the writ of error will be dismissed without considering the Federal question."

Rutland Railroad Co. v. Central Vermant Railroad Co., 159 U. S., 630; (Book 40 L. Ed. 284).

In the opinion proper, Mr. Justice Gray, voicing the unanimous decision, says:

"It is well settled by a long series of decisions of this court that where the highest court of a state in rendering judgment decides a Federal question and also decides against the plaintiff in error upon an independent ground not involved in a Federal question and broad enough to support the judgment, the writ of error will be dismissed without considering the Federal question." Murdock vs. Memphis, 87 U. S. 20 Wall. 590 (22:429); Jenkins vs. Loewenthal, 110 U. S. 222 (28:129); Beaupre v. Noyes, 138 U. S. 397 (34:991); Walter A. Wood Mowing & R. Mach. Co. v. Ekinner, 139 U. S. 293 (35:193); Hammond v. Johnston, 142 U. S. 73 (35:941); Tyler vs. Cass County, 142 U. S. 288 (35:1016); Delaware City S. &. P. S. B. Nav. Co. v. Reybold, 142 U. S. 636 (35:1141); Eustis v. Bolles, 150 U. S. 361 (37:1111), in the last two of which many other cases to the same effect are cited."

In concluding the opinion, it is said:

"But in each case the decision of the Federal question was not an essential element in determining whether the plaintiff was entitled to recover against the defendant.

Writs of error dismissed for want of jurisdiction."

LIMITATIONS AND ESTOPPEL.

Among the questions of fact adjudicated adversely to the plaintiff in error was that of limitations. The record conclusively establishes that no part of the premises in controversy were ever a street or ever used as a street, and no person ever enjoyed any part of such premises in any manner for street purposes.

The quotations from the pleadings, and findings of the trial court and judgment and decree of the Supreme Court last above set forth establish this fact. Not only in the original opinion, but on rehearing also the Honorable Supreme Court of Idaho adhered to this statement.

At Page 129 of Record, Fol. 293:

"The grantors of the defendants in the case at bar were in a position or situation to assert their title to said lots as against the City of Lewiston for the reason that they had buildings or enclosures covering said entire lots and were claiming them at the time the entry was made by the Mayor."

Page 130, Fol. 295.

> "While in the case at bar we hold from the evidence that the respondents did derive their rights from the fact of being on the land at the time it was entered by the Mayor or derived their rights from their predecessors who were on the lots at the time."

Page 131, Fol. 295:

> "In the case at bar the respondents and their predecessors in interest have been in the actual physical possession of the said lots their entire length, fifty feet, for thirty-five or forty years, and the city has not at any time molested, interfered with or disputed their right and ownership therein."

We take it as firmly established that the defendants in error and their predecessors in interest have at all times since their first entry claimed the ownership of these lands out to the south line of "D" Street as established by user, and as shown by the red ink line on the map at Page 28 of the Record. Such possession and use has been open, notorious, visible, continuous, certain, acquiesced in and peaceable. The City of Lewiston has never questioned this right. On the other hand it has recognized this line as the real south line of "D" Street.

The City of Lewiston is not a party to this case. Even if it were, under the facts found and sustained, the right of the defendants in error, under the statute of limitations, would be absolute.

The statutes of limitations set forth in the Revised Statutes of Idaho, 1887, provide as follows:

Sec. 4061: The limitations prescribed in this title apply to actions brought in the name of the Territory or for the benefit of the Territory in the same manner as to actions by private parties." This statute was construed to apply to municipal corporations and cases sustaining such construction are collated by the Supreme Court of Idaho in Bannock Co. vs. Bell, 8th Idaho, P. 1 (56 Pac. 710).

Section 4036, R. S. Idaho, 1887 reads:

> "No action for the recovery of real property or for the recovery of the possession thereof can be maintained unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the property in question within five years before the commencement of the action, and this section includes possessory rights to lands and mining claims."

This section was construed by the Supreme Court of Idaho in Bradley vs. Johnson, 11 Idaho, 689; (83 Pac. 926).
Fountain vs. Bank, 11 Idaho, 451; (83 Pac. 505).

The record showing that the defendants in error and their predecessors have been in the uninterrupted possession of these lands for thirty-five or forty years last past prior to the institution of the action, and the record further showing that no part of the lands in controversy was ever claimed or owned by the plaintiff in error or used by any person as a street, it would seem the bar of the statute under Section 4036 is perfect.

So far as the City of Lewiston itself is concerned, being a municipal corporation, it is, under Section 4061 of Title II. of the Code of Civil Procedure of Idaho of 1887, subject to the provisions relating to limitations of actions.

Section 4035 R. S. Idaho, 1887, reads as follows:

> "The people of this Territory will not sue any person for or in respect to any real property or the issues or profits thereof by reason of the right or title of the people to the same unless:
>
> 1. Such right or title shall have accrued within ten years before any action or other proceeding for the same is commenced.
>
> 2. The people or those from whom they claim shall have received the rents and profits of such real property or some part thereof within the space of ten years."

The record shows at folio 41 P [illegible]...

> "That these answering defendants seek only to build on their lands so occupied by them and their predecessors in interest from time immemorial and from a time at which the memory of man runneth not to the contrary, and so seek to enjoy and use the said premises, as the same have been so used by them and their predecessors in interest and are not in any way seeking to take any part of "D" Street of the said city."

The lower court found (R. P. 18, Fol. 46; Finding No. 5):

> "That for more than 30 years last past, the defendants and their predecessors in interest have been in the continuous, open, exclusive, notorious, peaceable, visible and acquiesced in possession and occupancy of the premises which they claim in this cause, and have been exercising rights of ownership therein, and, have, for 30 years last past been unmolested in their claims by the City of Lewiston, and that the predecessors in interest of the said Matthew Scully as well as the said Matthew Scully, have acquiesced in such ownership and occupancy of the said defendants and their predecessors in interest up to within the time embraced since the commencemnt of this action,

and shortly prior thereto, when Matthew Scully set forth his claims, as stated in the complaint."

At Page 23, Finding 57, the trial court says:

"That Matthew Scully has filed to show that he had any ancient lights or rights to air or view, which have in any way been interferred with by defendants or any or either of them, and that the plaintiff failed to show that the rental value of his building or any part thereof, would in any manner be impaired or lessened, by any act of defendants or any or either of them."

The Honorable Supreme Court of Idaho upon this issue states: (R. P. 126, Fol. 287):

"There is no dispute in the evidence but that the defendants and their predecessors in interest claimed and occupied the lots in question to their full length. Buildings and other improvements had entirely covered the said lots. The owners occupied and possessed said lots fifty feet in length. It is not claimed or shown that any part of said lots were ever used as a street, or any part thereof, nor that the city ever claimed any part thereof as a portion of the street, and the city surveyor cannot make any portion of said lots a street by simply making a plat and indicating on such plat that said lots were only forty-five or forty-six feet in length. * * * The record clearly shows that the Mayor recognized the incorrectness of the plat, as he executed deeds showing that fact long prior to the time that said plat was filed. While the plat was made and approved in 1875, it was not recorded until 1879. The City of Lewiston is not here complaining of the erection of buildings on the lots referred to in her streets. The record clearly shows that the city has for forty-five years known that the occupants of the lots on said Block 24 were claiming that such lots were fifty feet in length and that they had buildings and other improvements covering said lots."

Record, P. 126, Fol. 288, says:

"Taking the whole record, it sufficiently appears that that portion of D Street in controversy has never been possessed and occupied and used as a street, although the other parts of the street have been used since 1861, about forty-six years."

On re-hearing, the Court re-affirming this view, says, (R. P. 131; Fol. 295, 296):

"In the case at bar the respondents and their predecessors in interest have been in the actual physical possession of the said

lots for their entire length, fifty feet, for thirty-five or forty years, and the City has not at any time molested, interfered with or disputed their right and ownership therein."

Under the facts and the law above set forth the defendants in error respectfully submit that the decision of the Supreme Court of Idaho is sustainable upon the question of limitations and estoppel alone. This Court has frequently held that such questions do not raise any point of Federal law.

In Weyerhauser vs. Minnesota, 176 U. S., 550; 20 Sup. Ct. Rep. 485; Book 44, L. Ed., 583; this Court says:

> "Besides whether a party in a case has been given or refused the benefit of the law of estoppel involves no Federal question."

In Minneapolis & St. L. Ry. Co. vs. Minnesota, ex rel. Railroad vs. Warehouse Commission, 193 U. S., 53; 24 Sup. Ct. Rep 396; Book 48 L Ed. 614; this Court says:

> "The finding like the verdict of a jury is conclusive in this Court. Dower vs. Richards, 151 U. S., 658; 38 L. Ed. 304; 14 Sup. Ct. Rep., 452."

On the authorities heretofore cited, the defendants in error contend that questions of limitations, estoppel and laches all relate to state procedure and do not involve a Federal question.

Point 8 of the motion is:

> "The Federal question attempted to be raised by the writ of error was not claimed nor set up by the plaintiff in error in the state courts in such a manner as to entitle this Court to review it."

In discussing this point, we simply refer to the complaint, (Record, Pp. 1 to 6), the assignment of error in plaintiff's bill of exception in his motion for new trial, and the assignments upon which he relied in his appeal to the Supreme Court of the State of Idaho, as set forth in Record at Pages 106 to 112; also the specifications of grounds for a new trial shown in the motion for new trial, at Page 113.

It is respectfully insisted on the face of this record that no Federal right was especially set up or claimed until after the judgment in the highest court in the State of Idaho. This being true, the writ should be dismissed.

California Nat. Bank of San Francisco, plaintiff in error, vs. Richard P. Thomas, 171 U. S., P. 441; Book 43, L. Ed., Page 231.

County of Cook vs. Calumet, Chicago Canal & Dock Co.,

138 U. S., 635; Book 34, L. Ed. 1111.
Swearingen vs. St. Louis, 185 U. S., 38; Book 46 L. Ed. 795.

For all of the above reasons the defendants in error contend that the motion to dismiss should be sustained and the writ quashed.

Respectfully submitted,

James H Gorey

Residence and Postoffice Address, Moscow, Idaho.

Edgar N. Smith

Residence and Postoffice Address, Lewiston, Idaho.

Attorneys for Defendants in Error.

Service of the above and foregoing notice of motion to dismiss writ of error also motion to dismiss writ of error, also brief on motion to dismiss, hereby accepted this, the .....day of November, A. D. 1908 at Washington in the District of Columbia.

.....

Attorney of Record in the Supreme Court of the United States for Plaintiffs in Error Herein.

Supreme Court, U.
FILED.
JAN 28 1909
JAMES H. McKENNE
CLE

21.

No. [redacted]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908

[redacted]

MATTHEW SCULLY, PLAINTIFF IN ERROR.

vs.

LOUISE SQUIER, JOHN M. FIX, AND JOHN Q. MOXLEY, DEFENDANTS IN ERROR.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR

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SUPREME COURT OF THE UNITED STATES

October Term, 1907.

No. 498

MATTHEW SCULLY, Plaintiff in Error,

vs.

LOUISE SQUIER, JOHN M. FIX, and JOHN Q. MOXLEY, Defendants in Error.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR

Statement of Facts of the Case

The defendants in error desire to supplement the statement of facts as made by plaintiff in error.

This case arises over the alleged controversy as to the location of the south line of "D" street in Lewiston, Idaho. Lewiston, Idaho, was entered under the Federal Townsite Act, and was in existence before the act of Congress relative to such entries was enacted, having been incorporated under the laws of the Territory of Washington in 1863. It had streets, lots, blocks, and city government prior to the passage of those acts.

After the approval of the Federal Townsite Act, application was made by the then Mayor-Trustee of Lewiston, Hon. Levi Ankeny, now U. S. Senator from Washington, to enter thereunder, such entry and application being No. 39, as

evidenced by certificate thereof, and was made November 21, 1871. Thereafter, the Territorial Legislature passed an Act dated January 8, 1873, which is set out at length in the brief of plaintiff in error, and for that reason is not repeated here.

In virtue of the laws referred to, one E. B. True was employed as surveyor (Record 105, F. 247) and thereafter made the map or plat which was originally called the "E. B. True" survey, which is set out, WITH RED LINES SHOWING AMENDMENTS THERETO between Pages 28 and 29 of the record.

FACTS NOT DISPUTED IN RECORD.

At no place in this record, either in the court below or in this court, is it contended that the survey of E. B. True was correct. It is established by the evidence and is undisputed, that in laying out the location of the south line of "D" street, as well as other streets, the surveyor ran his line through buildings, through lots which were occupied, through lots which were fenced and enclosed by bona fide occupants, and paid no heed or regard to the rights of the occupants of such lands, nor to the powers conferred upon him, nor to the duties imposed. Among his duties were the following, as appears by reference to the Laws of Idaho at Pages 10-16, of the brief of plaintiff in error:

> "That the survey and platting of the land described in the aforesaid patent for said City of Lewiston, shall be so as to divide the blocks into lots, to be whenever practicable, each fifty feet in width and one hundred feet in depth, and the fractional block or blocks, lot or lots, acre or acres, shall be so arranged and adjusted as to conform to the condition of the improvements and occupation at the time of the enforcement of this act.
>
> (Section 2, Page 11, Brief of Plaintiff in Error."

It will be amply shown by the record, that as to the south line of "D" street, in controversy, as well as to the south

line of "D" street almost throughout its entire length, the surveyor violated this provision of the law in the following particulars:

1. He attempted to cut the lots down to a smaller dimension than fifty (50) feet North and South, which had been their dimensions and occupancy from time immemorial.

2. He drew the south line of "D" street on paper, and made his field notes show such line, where no street ever existed;

3. He paid no heed, regard or attention to the several use, occupancy and enjoyment of the said lots as they were used, occupied and held, but attempted to cut off from the several inhabitants, about four feet of their lots, although at the time, such portion was occupied by buildings in some instances, and in others by improvements and in all cases, by actual bona fide occupation, showing continued use, occupancy and claim of right.

The origin of the controversy is, that Mathew Scully acquired Lot six (6), Block twenty-four (24), and after occupying out to the south line of "D" street (as established by user) for many years, he built a new building and drew it back of his own volition, to the erroneous south line, as established by E. B. True's erroneous survey and field notes.

Thereafter, the defendants in error, who own Lots 5, 4, 3, and 2 in the same block, were constructing their modern buildings on their possessions, and building them out to the line which was established as the south line of "D" street by user and to which they and their predecessors in interest had occupied since prior to the passage of the Federal Townsite Act, and, as shown by the witness Coburn, since 1862, and thereupon this suit was instituted to prevent such occupancy.

It is a peculiar feature of this case that Lot one (1), Block twenty-four (24) of the City of Lewiston, is owned

by the defendant, John Q. Moxley; that the building owned by Moxley on that lot extends north to the south line of "D" street as established by user, and that plaintiff in error makes no complaint about such facts. Moxley testifies concerning this lot at Pages 79-80, as follows:

> "(It is here admitted that this witness is grantee by mesne conveyance from Wesley Mulkey).
>
> "I knew Wesley Mulkey's signature when I saw it; have seen him write his name and am familiar with his writing. (Document shown witness). This is his signature; knew him 10 years; have had business transactions with him and the land known as Lot 1, Block 24, of the City of Lewiston, is the land I purchased from him by mesne conveyances. My building is on that land—the building is 25x50, two story brick; cost about $6,000.00. That building has been there about 20 years; that is the brick where my drug store is; and this new building I propose to build is on the line on D street with my old one, and my new building comes out to the distance that my present building does; and covers simply the ground where my old wooden building stood.

At Record Page 80, Folio 188, is seen the application of Wesley Mulkey for this Lot 1, Block 24, dated July 2nd, 1875, in which this lot is described as fronting on Third street 50 feet; and being 25 feet on E street and also 25 feet on D street.

The deed from the Mayor Trustee to this lot, is found at Page 34 of Record, Folio 80, and describes it as,

> "Lot No. one (1), Block 24, contains an area of 1,257 feet, etc."

We have then, in this document and this application and this evidence, positive and conclusive proof that the lots in Block 24, were originally fifty (50) feet North and South, because Third street, whereon the 50-foot dimension is given, runs North and South. (See map, Page 28-29).

This evidence shows that E. B. True exceeded all authority in running his "paper" line where he did, because he made Lot one (1), Block 24, of the following size, to-wit:

(Record, Page 54, Folio 126.)

Lot 1—Side.	Length.
3rd	45 1-2
E.	25
1 and 2	45 1-2
D	25

Area, 1,137; equiv., 50x100. 227.

Whereas the application shows it to be 25x50, the deed shows the same length as to 3rd street, and the actual occupancy since time immemorial shows it to be this size; the area 1,257 given in the deed is explained by an angle in the wall on the "D" street side.

Here then is absolute evidence that E. B. True disregarded his powers and his duties because,

A. He made this lot but 45 1-2 feet long, whereas it was actually 50 feet and whereas, the law itself commanded him to make lots 50x100: (Session Laws set out in brief of Plaintiff in Error as follows): Page 11, Sec. 2.

> * * * That the survey and platting of the land described in the aforesaid patent for said City of Lewiston, SHALL BE so as to divide the blocks into lots, to be, whenever pareticable, each fifty feet in width and one hundred feet in depth, and the fractional lots, etc.

B. The application for Lot one (1), Block 24, shows Mulkey to have actually occupied the whole thereof. Page 80, Folio 188, says:

> "That I hold said lot by occupation and improvements, having a building thereon."

Therefore, when True cut this lot to 45 1-2 feet instead of 50 feet, he ran his line through improvements, and paid no heed or regard to the South line of "D" street as then established by user, although his authority as set forth in Section 2, Laws Idaho 1873, Page 11 of Counsel's brief, says:

> "That the streets, lanes, alleys and other rights of way which may be in common use at the time of the enforcement of this act within the said city, over the land described in the aforesaid patent, are hereby declared to be public highways, for the use and benefit of the inhabitants of said city in common, and that the survey and platting of the said land in block and lots, acres or parts of same *shall conform thereto.*"

C. True established a South line for "D" street, which was not that established by user, and therein exceeded all his authority and powers.

D. The Mayor-Trustee, under whose supervision this survey was made, knew of this void designation and deeded this lot as it was used, in direct conflict with the "paper" street and "paper" lot which Mr. True created.

E. The law itself commanded True to show streets where the same had been established by user; this he failed to do, and exceeded all his powers in fixing "D" street, as bounded on the South, where no boundary had ever existed.

As further showing the erroneous work of E. B. True in delineating this South line of D street, we cite the following instances at various places along such line.

LOT 2, BLOCK 24.

This is one of the lots in controversy, belonging to Louise Squier. At Page 77, Folio 181, Hazen Squier testifies as follows:

> "My wife is a defendant here. I first came to Lewiston in 1865, but came here to reside in 1869. I went into the saloon business and have been running that saloon since; that was known as the Bunker & Squier saloon; also, the O. R. & N. When I bought in I think it was called the Exchange; have lived here right along since 1869.
>
> * * * * * * * * *
>
> "I don't know about the South line only as the line was used, that the buildings conformed to, and my building was supposed to be right on that line of D street; my building was built in 1868."

The witness shows that he is building just to the line which his old buildings occupied, and this is the south line of D street as established by user and as fixed by the Mulkey deed, heretofore considered. At Page 39, is shown the deed to this Lot 2, and it contains 1,250 feet; and Lot 2, Block 24, is described therein, as

> "Lot No. 2, of Block No. (24) twenty-four, and extension of 476 feet by 25 feet in Lot No. 2, according to the plats of the city."

Evidently, there is a typographical error in this description, as the extension of 4.76 (decimal point omitted) by 25 feet, would exactly make this lot 25x50, the amount of 1,250 feet as called for in the deed. This deed, however, recognizes the extension, "ACCORDING TO THE PLATS OF SAID CITY," thus showing an amendment of the plat prior to the execution of this deed, which was in October 26th, 1875.

At Page 73 record, we find Mr. Squier testifies:

> "The proposed building I have is simply on the line of my old building; the building that burned up, was built in 1868. I was in the states that winter when it was built, but it was built in 1868, and I bought in there in 1869. I used to be clerk of this court years ago, and I was also treasurer of the city."

Witness then, at Pages 74 and 75, shows this line to have been the line of "D" street.

The field notes of E. B. True show this lot to be but 45 1-2 feet north and south, whereas, this witness knew and so testifies that the actual occupancy thereof was fifty (50) feet, and the deed to this lot, as extended "according to the plats of the City," conveys this lot as 25x50.

The field notes are found at Page 54 of this record.

LOT 3, BLOCK 24.

The erroneous work of E. B. True as to this lot, is as clearly shown as it is to the other lots in Block 24, just considered. This is the John Q. Moxley lot, in controversy. Mr. Moxley owns Lots one (1) and Three (3), Block 24. The deed to this Lot 3, Block 24, runs to Moxley from the Mayor-Trustee. It is found at Page 31 of the record (bottom of page) and at Page 32, this lot is described as

> "All of Lot No. (3) Three, of Block No. (24) Twenty-four, with an amendment, according to the plats of the said city."

This deed is dated Sept. 23rd, 1875.

The testimony as to the occupancy of this lot, shows as follows: Moxley on stand page at Page 92, and also Page 93, shows that this lot was occupied out to the line of D street as established by user, and that the entire of Block 24 had recognized this line as the South line of D street.

At Page 94 he says,

"I bought out the Kelly drug store in 1874, and the drug store building together with the store room building and that ran back even to the Squier building, and afterwards I built the building that was there that was recently destroyed by fire, and the building which I built, ran out to the line of occupancy and that was the condition prior to 1885.

Q. How far do you remember Whitfield Bros. were there?

A. Back even to our lots.

Q. When do you remember the Whitfield Bros. before or after the True survey?

A. Both before and after.

Q. That was before the True survey?

A. Yes sir.

Q. Mr. Tweedy asked you if that was—condition in 1885?

A. That fence was there prior to 1885."

At Page 82, this witness says:

"At that time I was in the occupancy of all the land I seek to build on now, and have continued to be in the actual occupancy of it; I have owned it since '75; I bought it in 1874, that is Lot 3, that is the Kelly lot, where Kelly's old drug store was; that is where Mrs. Eben Mounce's father used to live; none of the lots I have had possession and claimed since the issuance of the deeds, have been used as a street; my buildings are up to the point of user of the south line of D street; and my proposed building is the same; my first possession was of this lot of the size I claim now; it was up to the same lines, out even with Squier's lots; and that was the south line of D street as established by user."

He then shows that this same south line, extended into and was the south line of D street as to Block 23, of which more will be said later.

LOTS 4, 5 AND 6 OF BLOCK 24.

Lots four and five are in controversy as the property of John M. Fix, and Lot six, Block 24, is the property of the plaintiff in error, Matthew Scully. We shall now show that this same line of D street, was the one which Fix and his predecessors from time immorial, as well as Scully and his predecessors, from time immorial, used and knew to be, the south line of D street, until Scully built his new building.

WITNESS EDSON BRIGGS.

Pages 56-57: (Testifies concerning a plat which he made):

"I said this red line is to show the property line and the property as it extended over the street line. These buildings were actually in existence as I have drawn the red line.

Q. How long have you been in Lewiston?

A. Off and on since '73.

Q. Do you know Lot 2 of Block 24 belonging to Mr. Squier?

A. Yes sir.

Q. Do you know the old building that was recently destroyed by fire, there?

A. I did, yes sir.

Q. How long had that building been there?

A. It was there when I came to the country."

* * * * * * * * *

Pages 57-58:

"The old building of Mr. Scully was on his lot at the time I made this survey, and was out almost to the

red lines I call the line of D street; that building has been there—before I came to this country; it was quite an old building then; I didn't take much notice of it; but I know the building was there; I remember the condition as to the Moxley lot—No. 3, Block 24—there was a building on there.

Q. And as to Lots 4 and 5; we will speak of Lot No. 4, what was that the John Glass lot?

A. That is the Squier lot.

Q. Four?

A. Yes, that is where Glass was.

Q. And Lot 5 was James Kearney's and Conrad Wintsch's?

A. Yes sir.

Q. These buildings were there too?

A. Yes sir.

Q. The buildings recently destroyed by fire, being 2, 3 and 4 and Lot 5 of Block 24, were covering those lots as they stood just prior to the fire, for a period in your recollection, that dates prior to the True survey?

A. Yes sir; about that time."

At Page 57, this witness says:

"According to this—the line which you call for convenience the building line—where the buildings were—was a fairly straight line; when I surveyed this property, I noticed where the front of Scully's old building was.

* * * * * * * * *

Page 57:

"The old building of Mr. Scully was on his lot at the time I made this survey, and was out almost to the red lines I call the line of D street; that building had been there before I came to this country; it was quite

an old building then. I didn't take much notice of it, but I know the building was there."

WITNESS D. C. WRIGHTER.

Page 60 (Explains a plat which he has made):

"I represent the old buildings as being a straight line, because I know of my own knowledge they were; they were practically even, I wouldn't say an exact line. I didn't see the Scully building before he tore it down and erected his new one. I don't know anything about how far it came out. The other buildings, before they were burned down, I know of because I had to run an off-set;

* * * * * * * * *

"I know of Fix erecting a new building there. He is bringing it out, I think, to the inner red line; the red line just north of the True survey. * * * Fix is bringing his new building out to the red line we are speaking of now. I am building inspector now, in Lewiston, hold two offices. * * * The other defendants were also building the other day; they are building out as far north as Mr. Fix."

At Page 62, this witness shows that it is impossible to take True's notes and plat, and locate the lots, the street line or the periphery of the block. He shows that the south line of "D street," as drawn by True, is 200 feet long, in Block 24; he also shows that the lots fronting on this south line of "D" street will not take this distance, up, but refuse to close. See Writer, Pages 62-63.

This witness shows the errors in the survey of E. B. True, throughout the work.

WITNESS MATTHEW SCULLY.

Page 160:

> "These buildings were there when I built. They, I think, were there when I first knew the premises in 1877."

Witness Scully at Page 47, says:

> "I say that Mr. Fix wanted me to join with him to ask the council to go out to the line I had been occupying with the old wooden building. When I bought that land there was an old wooden building that came out not quite, pretty near though, but close to, as—far—as Fix's building does now, and immediately west of me is Grostein with a big wooden building there now, and that building was there when I bought the land, and my building came out a little further, I think, than Grostein's building does now."

WITNESS HAZEN SQUIER.

Pages 73-74 shows that the lot which Scully owns (Lot 6, Block 24) ran out to the line as established by user, and also tells of the fence that was built there to make the line straight.

WITNESS CHESTER COBURN.

Pages 83 to 86, inclusive, shows that this south line of D street extended over along Block 23, and that this was the line since 1862 because there is still standing a house or store room, which was occupied by his son, which was erected in 1862, and is 50 feet north and south. This witness also shows that the south line of D street has been the one to which all the modern buildings in Lewiston, on that street, have conformed.

WITNESS JOHN Q. MOXLEY.

Pages 92, 93, 94, shows where this south line was by user, and that it was a straight line, and that the Scully lot came out to the line. He also shows this line to have existed before the survey of E. B. True as he came here prior to that survey.

WITNESS JOHN M. FIX.

Pages 94, 95, 96, 97, shows that this line existed at the time he was in business over in Block 23, with John P. Vollmer and that all the people along that street had their possessions marked and either covered by buildings out to this line, or there were fences which came out to this line. At Page 96, he says:

> "In these old buildings, each man built his own building separately, and while some of theme were shorter, there was a fence to cover the balance of the lot right on the line, and these were on a general line."

SOUTH LINE OF "D" STREET IN BLOCK NO. 23.

As further showing this south line of "D" street, we direct attention to the following lots in Block 23, all of which were conveyed out to this line, and which were so conveyed in face of the survey.

LOT 6, BLOCK 23.

At the map between Pages 28 and 29, will be found the plat of the city. In Block 23, Lot 6, is shown to be the western lot of the block and it will be noticed that there are red lines at the west and at the north of this lot. A reference to the field notes of E. B. True at Page 76 shows this lot to be of the following dimensions, to-wit:

A width of 25 feet; and a length of 46 feet.

As this lot is known as the Lowenberg lot, we shall refer to it as such. This Lowenberg lot was applied for as shown at Page 98, and was described as 25x50 feet; and at Page 101, is shown an application to have this survey corrected, so as to show this lot to be, as it was in fact by occupancy, 26 feet in width by 50 feet in length. This application is dated July 14th, 1875.

On these two applications the deed to this lot was executed as appears in the record at Pages 103-104, and is deeded as,

> "Lot No. 6 (6) of Block No. (23) according to the plats of said city, described as follows, to-wit:
>
> * * * * * * * * *
>
> "Lot six in Block twenty-three, fronts on E street 26 feet, on D street 26 feet, and on Third street 50 feet, containing 2,550 feet, etc."

This deed was executed Dec. 15th 1875, and is in conformity with the occupancy of the lot and not in accordance with the field notes nor the original plat; it conforms to the red lines on the plat, and hence with the plat as amended.

LOT 4, BLOCK 23.

This is the John P. Vollmer lot. It is described by E. B. True in his field notes, as being (Page 76) 26 feet wide and 46 1-2 feet long, north and south. But the deed conveys it as,

> "(Page 103). Twenty-six feet in width on E and D streets and *fifty feet* in length, containing one thousand three hundred feet, etc."

This conveyance is also said to be in accordance with the "plats of said city." The deed is dated Dec. 13th, 1875.

These deeds establish that in Block 23, the lots were recognized and deeded as being 50 feet north and south, and

this puts the south line of "D" street where the defendants in error contend it always was; the survey of E. B. True made these lots in Block 23, only 46 1-2 feet long, but this survey was repudiated by the Mayor-Trustee under whose administration it was made, and in the year 1875, about four (4) years before the plat was recorded.

OTHER ERRORS OF E. B. TRUE.

By reference to map between Pages 28 and 29, and especially Block 21, red lines will be shown to mark the boundaries of Lots 6 and 7, of Block 21.

The same "LOWENBERG" Brothers, who owned Lot 6, Block 23, were interested in this land, at least as to Lot 7; and Mrs. Fogarty was interested in the remainder, or Lot 6 of Block 21. At Pages 99-100 of the record, is shown an offer, to prove to the court that Lowenberg Bros. started a suit, which was adjudicated, and compelled the Mayor-Trustee to have this land surveyed into lots according to their occupancy, and not to have them left as a street, in accordance with the survey of E. B. True as delineated in his plat.

As substantiating this offer, we call attention to the

WITNESS JAMES CONLEY.

At Pages 89 to 91, who says he is the child of Mrs. Fogarty, who is referred to in the offer before made, and this witness then testified (Page 90):

> "I live now at 379 Main street; have lived there since I came here; my mother's name was Katharine Conley. Prior to her marriage her name was Katharine Fogarty. She could not write her name; my mother owned that property where I now live; I don't know how long she owned it; I was quite small; I re-

member my mother living there and the building we hand there; I remember part of E. B. True's survey as I had lived there before that; I remember my mother having some trouble with the city about—but I couldn't be positive, etc."

This record was erroneously rejected on the objection of the plaintiff in error. But it would show that this plat of E. B. True was before the court, and that the court decided in favor of the occupants and against the "plat" of the engineer. This record is omitted from the printed record here, because the plaintiff in error was defeated below, and his record on appeal did not embrace this error in his favor. It was not incorporated in a cross-appeal, as our Supreme Court has held that there is no such thing as cross-appeal in Idaho.

ERRORS IN PLAT AND FIELD NOTES OF E. B. TRUE.

The errors as to Block 24, have been shown; the errors as to Block 23, are shown by the fact that the south line of D street, according to True, was given the same course throughout. His acts in thus establishing a south line of a street where none had ever existed, and cutting off some four feet of the property of claimants, are more than mere errors; they are acts beyond his powers, because he was commanded to lay out streets as they had been used; to give due regard and attention to lots, as occupied, and was shorn of all power to divest property as he attempted.

RED LINES ON PLAT AT PAGES 28-29.

It is to be observed that the ORIGINAL PLAT was introduced in evidence (Page 28) and the record supplied with a copy from the Auditor's office (Page 28). These red lines appear not only on the original, but also the recorded copy.

Our statute provides, Section 6030, R. S. Idaho, 1887:

> "The party producing a writing as genuine, which has been altered, or appears to have been altered after its execution, in a part material to the question in dispute must account for the appearance or alteration. He may show that the alteration was made by another without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he do that he may give the writing in evidence, but not otherwise.

At Page 28 of record, is shown the offer of this original map, with these red lines on it; objection was made under the above section, and the objection overruled. The only ground upon which this ruling can be sustained is, that the instrument itself did not show that the *red lines were placed there after the execution of the instrument*. This is the construction of the above section as set forth in:

Mulkey v. Long, 5 Idaho 213 (216).
Sedgwick v. Sedgwick, 56 Cal. 213.

Based upon this record, the court found, and the Supreme Court sustained the finding, that,

THE PLAT AS ORIGINALLY MADE HAD BEEN AMENDED.

The court found that this amendment to the plat was made and the findings are set out in record at Pages 20-21, same being paragraphs numbered respectively 11, 12 and 13. Particularly do we call the attention of the court to the following language at Page 20, Paragraph 11:

"That according to the field notes and the plat and the survey of E. B. True—the said survey and plat interferred with and ran through buildings then in the actual use and occupancy of the claimants of land, and cut off approximately four feet from the north end of buildings then standing and in actual use and occupancy of bona fide claimants thereof, in Blocks twenty-three and twenty-four of the city of Lewiston, and failed to conform to the use and occupation thereof; that the lots in question are some of the lots on which the said plat and survey cut-off approximately four feet, from the north end of said lots, and that at the time of making of said survey, such portions of said lots were then actually claimed, occupied and used by bona fide occupants and claimants thereof, and that the south line of "D" street as then established by user was approximately four (4) feet north of the line originally shown on the E. B. True map of said city, as being and constituting the south line of "D" street as stated above, never at any time were used or claimed as street; and that the city of Lewiston has not in any manner ever claimed the same as street, or molested or attempted to molest either the defendants or their predecessors in interest in their claim of absolute ownership in and to that strip of land last referred to, but that said strip has at all times been in the actual possession of the claimants thereof, who were the predecessors of, as well as the defendants herein.

12. That shortly after the filing of the plat by E. B. True as required by law, with the Mayor-Trustee, applications for lands within Blocks 23 and 24 were received by said Mayor-Trustee, and that he executed to the bona fide occupants of lots, deeds, in accordance with their actual occupancy, notwithstanding the conflict of the said survey, therewith, etc., etc.

13. That thereafter and prior to the filing of the said map or plat of E. B. True, the same was amended in many particulars and that such amendments are shown on said plat by red lines; that the south line of "D" street as orginally shown on said plat, is shown by a black line, and that north of the same there is placed a red line, both on the original and on the recorded copy thereof, etc., etc."

The court then finds the various portions of "D" street, concerning which this condition existed.

This finding as to the amendment of the plat is sustained at Pages 120, 125, 126 of the record.

The evidence heretofore considered abundantly establishes the amendment of the plat:

a. The plat itself shows amendments in real lines, and these were not shown to have been made after its approval. The plat was admitted on the theory that these amendments existed before its approval and recordation.

b. The deeds executed by Mayor-Trustee, Henry W. Stainton, under whose administration the plat was made, attest that an amendment was made, as reference to the following deeds will abundantly show; and these amendments establish the south line of "D" street where it was fixed by user, and also, that the lots were fifty (50) feet long north and south—and not forty-six feet only, as E. B. True certified them to be.

Deed To	Conveys	Dated
Wesley Mulkey (Record, Page 33.)	Lot 1, Blk. 24	Dec. 11th, 1875
Hazen Squier (Record, Page 39.)	Lot 2, Blk. 24	Oct. 26, 1875
John Q. Moxley (Record, Page 31.)	Lot 3, Blk. 24	Sept. 23, 1875
John P. Vollmer (Record, Page 102.)	Lot 4, Blk 23	Dec. 13, 1875
Lowenberg Bros (Record, Page 103.)	Lot 6, Blk. 23	Dec. 15, 1875

c. The fact that the red lines appear on the record as well as the original, demonstrates that such red lines were on the original when it was recorded, which was July 1st, 1879.

d. The deeds referred to supra, are sustained by applications found at pages as follows:

Application Of	For	Dated
Wesley Mulkey (Record, Page 80.)	Lot 1, Blk. 24	July 2nd, 1875
Hazen Squier (Record, Page 78.)	Lot 2, Blk. 24	July 17, 1875
John Q. Moxley (Record, Page 81.)	Lot 3, Blk. 24	July 15, 1875
Lowenberg Brothers (Record, Page 98.)	Lot 6, Blk. 23	July 1st, 1875
Lowenberg Bro's (Record, Pages 100-101. This is for the amendment.)	Lot 6, Blk. 23	July 14th, 1875
John P. Vollmer (Record, Pages 84-85.)	Lot 4, Blk. 23	July 2, 1875

Of these applications, the one of Mulkey, of Lowenberg and of Vollmer, all made in July, 1875, refer to these lots as being 50 feet long; whereas the survey and field notes of

E. B. True make them but 46 feet, approximately. Yet, deeds were executed to Vollmer, Lowenberg and Mulkey for lots as being fifty (50) feet north and south; and to Squier and Moxley, the deeds described the lots as being conveyed, *"with an amendment."* and all these deeds were executed in 1875, by the Mayor-Trustee who had the plat made, and were so executed, approximately four (4) years prior to the recordation of the plat, as it was recorded July 1st, 1879.

The above evidence we submit conclusively shows that:

1. The original plat of E. B. True was amended.
2. The original field notes of E. B. True were erroneous.
3. The original survey of the south line of "D" street was void, as it cut off portions of lots, then actually covered by buildings, or occupied by claimants, or enclosed within the improvements of claimants.
4. The original plat was NEVER FILED as made, because it was amended prior to such recordation.
5. The amendment took place PRIOR TO THE RECORDATION, and in 1875, BECAUSE, the applications for lots by Lowenberg, Vollmer, Moxley, Squier and Mulkey were all made in July, 1875, and the deeds to these men were made from September to December, 1875, and each is in accordance with the use and occupancy of the lots. The deed to John Q. Moxley, at Record, Page 31, was executed on September 23rd, 1875, and that deed reads (at Page 32):

"In consideration of two dollars and 27-100 dollars, to me in hand paid, and received and by virtue of the authority above cited, I, the said Henry W. Stainton, as mayor of the said city of Lewiston, have this day granted, bargained, sold, aliened, remised conveyed and confirmed and by these presents do grant bargain, sell alien, remise, convey and confirm unto John Q. Moxley, of the City of Lewiston, Idaho Territory, his heirs and assigns forever, all of Lot No. (3) three, of Block No. (24), WITH AN AMENDMENT, *according* to the plats of the said city, etc., etc.

Here then, is a recital in Sept., 1875, that this plat and survey, were amended.

ERRONEOUS QUESTION ARGUED BY PLAINTIFF.

At Pages 36-44 of the brief of plaintiff in error, the cause is here argued as if it were one involving the deraignment of title to the several lots in Block 24. The question here is, as to the location of the south line of "D" street.

If the question at issue were the ownership of the lots within Block 24, to-wit: Lots two (2), three (3), four (4) and five (5) then Matthew Scully would go out of court, as he never claimed any interest in these lots.

If further the question at bar were the ownership of lots in Block 24, then Matthew Scully would go out of court as to Lot six (6), Block 24, because at no time did he ever show that his ownership related prior to the survey of E. B. True.

But the question is as to the location of the South line of "D" street; and to show that location, the defendants below proved the length of the lots, the location of the line as to

Blocks twenty-three (23) and twenty-four (24) and the ownership by deeds from the Mayor-Trustee.

If, however, the contention of plaintiff in error is correct, that the law itself measured the full power of the claimants to have their land allotted to them, and specified all the terms and conditions thereof, then there is no deed in Lewiston which is good, because Section 3, of the Act set forth at Pages 10-16 of brief of plaintiff in error, requires the applications to conform to the PLAT AS RECORDED. (Page 12.)

Now this plat was not recorded until 1879; and if this construction be true, then Matthew Scully has no title to Lot 6, Block 24, nor have any of the parties to the record any title whatever to their lots, because their applications were not made therefore *after the recordation of the plat.*

But as the sole question here was one as to the location of the south line of "D" street, it referred to the boundary of lands claimed under a Federal Act. It is to be noted that no one is here claiming any part of the lands belonging to Louise Squier, or John Q. Moxley or John M. Fix. The City of Lewiston, the only person which could claim any part of these lands, has seen this south line as established by user, exist since 1862—according to the testimony of Witness Coburn; and since 1868, according to the testimony of witness, Hazen Squier, and according to Moxley, sinc 1874, and according to Briggs since 1873 and according to the documentary evidence consisting of application for lots, made by Vollmer and Lowenberg and Mulkey, since prior to the survey, and has made no claim to any part of this land for street or other purposes.

If then, this question is the only one involved, it is difficult to see how the question of ownership is primarily involved, although it is secondarily the basis of the claim of the location of the south line of "D" street.

ERRORS ASSIGNED BY PLAINTIFF.

The various assignments of error by plaintiff, will be found to relate to but one question, viz: whether or not the acts of the surveyor in taking property without process of law, are void; whether the surveyor can arbitrarily and of his own volition, designate as street, any property which is covered by buildings, by uniform occupancy, by substantial improvements and enclosures, and the boundary lines of which property are located upon the ground, and constitute a street line.

The sole question here is, can the surveyor by running his line as a line of a street, create a street through private property, through buildings, enclosures and holdings, against the will, wish and consent of the property owners?

ARGUMENT.

In the presentation of the argument for the defendants in error, we shall discuss the following points and authorities.

POINT 1.

The record does not show that at any stage of the pleadings or proceedings, the plaintiff in error ever relied upon any Federal question in the State Court.

A search of the record will show that when the offer of evidence to show where the south line of "D" street was as fixed by user, the only objection made is, at pages as follows:

Page 49—Scully on stand on cross-examination.

> Q. You don't know of your own knowledge, Mr. Scully, that any part of the lots covered by these old frame buildings of Mr. Fix, and Mr. Moxley and Mr. Squier and Mr. Grostein was ever used as a street, was it?
>
> Objected to as incompetent, irrelevant and imma-

terial. Objection overruled. Plaintiff excepts to the ruling of the court.

A. No I don't think it was ever used as a street. I think the buildings covered a part of the street though.

At Page 50, the witness repeats that no part of these lots were ever used as a street to his knowledge.

At Page 50 an objection is made to the cross-examination of the witness, Briggs, as follows:

"Mr. Tweedy: I object to all this cross examination for the reason that it is not proper cross-examination and for the further reason that that red line is to show the obstruction as the defendants propose to make it at the present time, and for the further reason that occupancy does not give them any title to that part of "D" street as shown by the True survey.

At Page 75, the offer was made to show that True ran his line through buildings, and that the south line of "D" street as delineated by E. B. True, ran through buildings then in existence and runs now through buildings which have since been constructed.

To this offer, we find this objection only:

"Tweedy: I object as incompetent, irrelevant and immaterial; that the True survey shows the boundaries of the street and the fact that the buildings are on there is immaterial, and for the further reason that buildings being on these blocks east of this block, is immaterial, and don't make any difference in the case.

This objection was overruled, and exception taken.

It will be noticed that the objection does not go to the point that the buildings were there *when the survey was made;* nor that the south line of "D" street was then established by user and that E. B. True disregarded this line, and exceeded his authority in that regard.

At Page 83, Witness Coburn on the stand, the following proceedings appear:

> Q. Do you know what the size of those lots were supposed to be at that time?
>
> Tweedy: Oh, I object, I don't think he should be permitted to make that kind of proof in this case, etc.

The specifications of error in the motion for new trial in the State Court are set out at Pages 106 to 112, and at no place is there any assignment of any Federal question as basis for error.

The objections in the first place, amounted to nothing. They did not claim to reach the point that neither the occupancy at the time of the application, nor the existence of the south line of "D" street at the time of the survey or application, were immaterial or incompetent or irrelevant in any manner.

The objections were simply on the general grounds of "incompetent, irrelevant and immaterial." Such grounds amount to nothing and present no objection whatever.

> In Ency. Pl. & Pr. Vol. 8, Pages 218-236, inclusive, this rule which comes from the horn-books, is stated and all authorities collated.
>
> The necessity for specific objection is set forth at Pages 231, 236, Vol. 8, Ency. Pl. & Pr.
>
> In Paxson v. Brown, 61 Fed. 874, the rule is stated.

In the case of Brooks v. Missouri 124 U. S. 394; Bk. 31 L. 454, the following holding, taken from the syllabus, which is supported by the decision, occurs:

> "An objection to the admission of evidence because it was incompetent, and irrelevant, and because the witness by his conduct has shown himself unworthy of belief, and not because its admission would be a violation of any provision of the Constitution or laws of the United States, is not setting up or claiming any title,

right, privilege or immunity under the Constitution, Laws or Treaties of the United States."

Also the following:

"To give this court jurisdiction under Section 700 of the Revised Statutes, because of a denial by a state court of any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear that such title, right, privilege or immunity was specially set up, or claimed in the state court at the proper time, in the proper way; and the decision must be against the right so set up or claimed."

Generally, it is held by this court, that the question of admission or rejection of evidence, is not a Federal question.

Sherman v. Grannell, 114 U. S. 197; Bk. 36 L. Page 403.
Baldwin v. Kansas, 129 U. S. 52; Bk. 32 L. 640.
Brooks v. Missouri, 124 U. S. 394; Bk. 31 L. 454.
March v. Citizen's Insurance Co., 98 U. S.; Bk. 25 L. 90.
Brown v. Colorado, 106 U. S. 95; Bk. 27 L. 132.
Sayward v. Denny, 158 U. S. 180; Bk. 39 L. 941.

There being no Federal question presented to either the trial or the supreme court of Idaho, it is respectfully submitted that such question cannot be presented for the first time in this court, so as to give jurisdiction by writ of error.

Winona & St. P. R'y. Co. v. Plainview, 143 U. S. 371; Bk. 36 L. 191.
Quimby v. Bond, 128 U. S. 488; Bk. 32 L. 502.
Morrison v. Watson, 154 U. S. 111; Bk. 38 L. 927.
Scudder v. Coler, 175 U. S. 32; Bk. 44 L. 62;
Chapin v. Frye, 179 U. S. 127; Bk. 45 L. 119.
Wabash v. Flannigan, 192 U. S. 29; Bk. 48 L. 328.
Telluride Power Transmission Co. v. Rio Grande Western R. Co., 187 U. S. 569; Bk. 47 L. 307.

POINT 2.

THE NATURE OF THE GRANT.

It is respectfully submitted that the nature of the grant under the Federal Townsite Laws, is, that of confirmation of rights in existence. No new grant is made—simply the ascertainment of rights already in existence, and their certification. This is analogous to the deed of confirmation described by Blackstone.

Scully v. Fix, 13 Ida. 471.
Goldberg v. Kidd, 58 N. W. 574 (576-577).
City of Pueblo v. Budd, 36 Pac. 599;
Coefield v. McClellan, 16 Wall 334;
Stringfellow v. Kane, 99 U. S. 610;
Town Co. v. Maris, 11 Kas. 128-151;
Rathbone v. Sterling, 25 Kas. 333; (Mr. Justice Brewer).
City of Helena v. Albatross, 20 Pac. 817.
McCloskey v. Pac. Coast Co., 160 Fed. 194. Points 4-5-6.

It is therefore plain that the Mayor-Trustee and the Surveyor were not "granting" lands to these occupants. Their rights and duties were prescribed by the law itself, and neither could by exceeding the power given him, divest property rights nor defeat vested rights.

Scully v. Fix (Idaho), 13 Idaho 417; 90 Pac. 573.

POINT 3.

THE AMENDMENT OF THE PLAT.

We respectfully direct the attention of the court to the evidence heretofore set out and to the findings of the trial court and the decision of the supreme court of Idaho, as set forth in the brief on motion to dismiss, to show that this plat was amended, without again repeating the evidence or the findings and decision. This question on the findings is

set out at Pages 11 to 15 of the brief on motion to dismiss.

To recapitulate as to the deeds, it is only necessary to state that the plat was made from field notes of Aug., 1874 (Plat, Pages 28-29); it was approved by the Mayor-Trustee, June 22, 1875; filed for record July 1st, 1879.

The exact date of the amendment of the plats, does not affirmatively appear. It does appear, however, that the applications of Wesley Mulkey for Lot 1, Blk. 24, being 25x 50 feet in size, was made July 2nd, 1875; the application of Hazen Squier was dated July 17, 1875; the application of John Q. Moxley was dated July 15, 1875; that of Lowenberg Brothers, for Lot 6, Blk. 23, dated July 1st, 1875; the amended application of Lowenberg Brothers was dated July 14th 1875, and of John P. Vollmer the application was dated July 2nd, 1875.

The deeds to these parties were made as heretofore shown, as follows:

Wesley Mulkey, Dec. 11th, 1875;
Hazen Squier, Oct. 26th, 1875;
John Q. Moxley, Sept. 23, 1875;
John P. Vollmer, Dec. 13, 1875;
Lowenberg Bro's., Dec. 15, 1875;

and conveyed lands showing that the deeds were made with reference to "amendments" and according to the "plats of the City."

In addition, the suit of Lowenberg Brothers concerning Lot 7, Block 21, and the contention between Mrs. Fogarty and the City, for Lot 6, Block 21 has heretofore been shown.

It would seem, therefore, that the fact of the amendment of the plat was sufficiently established. In addition, the undisputed testintony of Witness Coburn is to the effect that the original buildings were all 50 feet north and south; that his son was conducting a harness store at the time of the trial, in a building which was built in 1862, which was 50 feet north and south. These things affirmatively fix the south line of "D" street, as that for which the defendants in error contend, and show that the lots were in fact 50 feet.

north and south, and not 46 or 46 1-2 feet, as erroneously certified to by E. B. True.

These facts were shown to have existed from time immemorial, as the old plat of the city at Pages 82 and 83, and the buildings now existing in the city were shown at Pages 83, 84, 85, 86, 87, to be to the south line of "D" street as used back as early as 1862. It is shown at those pages that the buildings in Block 22 Block 23, Block 24, all conform to the line as used, and that this has been the line for all time. Thus, the Witness Coburn tells of the Lewiston National Bank building in Block 22; of the Thiessen Building, the Binnard Building, the old building (still standing) where his son was doing business at the time of the trial; the John P. Vollmer building, both new and old; the Lowenberg building, and the new Mounce building, where Charlie Parker's saloon now is, in Block 23; and it is established that the Moxley building on Lot one (1), Block 24, on the lot known as the Mulkey lot; the new Squier building on Lot 2, Block 24; the new Moxley building on Lot 3, Block 24; the Fix building on Lots five (5) and six (6), Block 24, and the old Grostein building on Lot seven (7), Block 24, as well as the old Scully building (formerly the McGrance building) on Lot six (6), Block 24, all came out to the same south line of "D" street as fixed by user since 1862.

Against this evidence we have the line of E. B. True, which is overthrown by the deeds from Mayor-Trustee Stainton, as heretofore shown, and still it is insisted that the defendants have not shown that the south line of "D" street was different from that delineated by E. B. True.

Here then we have positive, uncontroverted evidence that the City of Lewiston, as well as Matthew Scully and his predecessors in interest in Lot 6, Block 24, have seen this line of "D" street used, accepted, and built out to as the south line of "D" street, since 1862, and no adverse claim of any person to the location thereof, has ever before been made.

We also have the certified deeds, executed by the Mayor-Trustee under whom E. B. True did his erroneous work, certifying to the amendment of the plats, and the correctness of the south line of "D" street as established by user.

All citizens of Lewiston, all officials since 1862, all property owners on "D" street have accepted the line as claimed by the defendants in error, and rejected the line as drawn by E. B. True, as the correct property line, and therefore it seems that the question in this case is reduced to one of

THE BOUNDARY LINE OF PROPERTY

as argued in the brief on motion to dismiss at Pages 8, 9, 10 thereof.

It will be noticed that the surveyor was commanded,

1. To make these lots fifty (50) feet, whenever practicable.
2. To make the street lines conform to those established by user.
3. To make his survey with due regard to the use, occupancy and ownership of lands, as vested in the settlers.

In addition, the law itself, provides at Section 2387 R. S. U. S. (U. S. Comp. St. 1901, P. 1457) inter alia,

> "* * the execution of which trust as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated."

And Section 2391 R. S. U. S. (Comp. Laws 1901, 1459) reads:

> "And any act of the trustees not made in conformity to the regulations alluded to in section twenty-three hundred eighty-seven shall be void."

The laws of Idaho Territory as quoted in the brief of plaintiff in error at Pages 10 to 16, inclusive, provide:

Section 2:

> That the streets, lanes, alleys and other rights of way which may be in common use at the *time of the enforcement of this Act* within the said city, over the land described in the aforesaid patent, are hereby declared to be public highways, for the use and benefit of the inhabitants of said city in common, and that the survey and platting of the said lands into blocks and lots, acres or parts of same *shall conform thereto.* That the survey and platting of the land described in the aforesaid patent for said City of Lewiston, shall be so as to divide the blocks into lots, to be, whenever practicable, each *fifty feet in width and one hundred feet in depth*, and the fractional block or blocks, lot or lots, acre or acres, SHALL BE so arranged and adjusted as to conform to the condition of the improvements and occupation, *at the time of the enforcement of this act,*" etc., etc.

When to this is added the positive statement from Section 2391 R. S. U. S., supra,

> "And any act of the trustees not made in conformity to the regulations alluded to in section twenty-three hundred eighty-seven, SHALL BE VOID,"

the deduction becomes irrestible that the survey and platting of lots into streets, which lots were covered by buildings, by improvements, included within fenced holdings, and claimed by bona fide occupants, was beyond the power and authority of both the engineer and the Mayor-Trustee, and hence absolutely void. These acts became ministerial, as to the determination of the boundary lines, and hence, any act of a ministerial officer beyond his powers is null and void.

Scully v. Fix, 13 Idaho, supra.

POINT 4.

The sole powers of the Mayor-Trustee and of the Surveyor were and are derived from the statute, and because that statute was violated in laying the south line of "D" street as E. B. True did plat it, his survey, delineation and platting thereof, are void. These officers, deriving their powers from the statute, must be able to show a compliance with a statutory power, before their acts can have any validity.

It is quite well settled that a void thing is no thing; hence, the delineation of the south line of "D" street as platted by E. B. True, was void ab initio, for want of power and for the reasons heretofore urged; it was therefore subject to attack at any time, at any place and in any court, and no rights could be founded upon such void and ineffectual work.

That a void judgment may be attacked at any time or any place, is well settled.

In Cyc, Vol. 23, Pages 1073-1074-1075

the rule is stated and authorities are cited to sustain it, among them being,

Phoenix Bridge Co. v. Castleberry, 131 Fed. 175.

In this court, the rule is well settled that a judgment of a court not having jurisdiction, is absolutely void and may be attacked collaterally.

Galpin v. Page, 18 Wall 350; 21 L. 959.
Griffin v. Frazier, 8 Cranch 9; 3 L. 471.
Williamson v. Berry, 8 How. 495.

Many other cases might be cited, but as we contend that the acts were merely ministerial on the part of the surveyor and Mayor-Trustee and as the statute set out the powers and duties of these officers and expressly provided that any act of the Mayor—(Trustees)—other than as set forth in the statute were void, it seems that the law is squarely against the contention of the plaintiff in error, that these acts in

excess of all authority, are simply "errors" which the officers had jurisdiction to make. Our position is, that the statute having set forth, defined and limited the authority of these officers, any act of theirs in excess of the authority must be absolutely void and hence, impeachable at any stage of the proceedings in any court and at any time.

In United States v. Thurber, 28 Fed. 56, it is said:

> "The ordinary rule unquestionably is, that where a statutory officer has jurisdiction over the subject, his determination is conclusive, except upon a review in such way as the law points out for the correction of errors. But there is one fundamental exception to this rule. Not only must the officer have jurisdiction of the subject matter, but he must also keep within the limits of the power conferred by statute. Whenever suit is brought, based upon such officer's action *it is always competent, by way of defense*, to show that the officer has departed entirely from the statute, or acted so contrary to it that his acts are deemed beyond his jurisdiction, and in excess of power; and in such a case what he does in excess of power is illegal and void, and may be shown in defense. Void acts are thus wholly different in their consequences from merely erroneous acts. Mere errors or mistakes in the performance of a duty do not make the officer's acts void. They stand good and valid until reviewed and corrected as provided by law."

In Parcher v. Ashby, 1 Pac. 204 (Mont.), it is held:

> "These regulations could not enlarge or diminish the rights or interests of occupants of the lots. And so our legislature provided that the survey and plat of the townsite should conform, *as near as might be to the existing rights*, interests and claims of the occupants thereof. The lots were to be surveyed and the streets and alleys *as they existed prior to the entry* were to be respected and recognized. For in no other manner could

the occupants obtain title to their lots according to their several rights and interests. The plat and survey of the Probate Judge *must conform* to the old survey by which the occupants held and occupied their lots prior to the entry of the townsite; otherwise, his plat and survey is so far *void.*

Again, at Page 208, same opinion:

"The rights of occupants accrued before the entry of the townsite by the Probate Judge and the mere fact that his plat and survey failed to designate a street or alley as it existed before the entry and survey, does not thereby destroy such street or alley and change the ground occupied by the same into a lot that can be sold. And so, for the same reason, if this plat and survey had designated ground theretofore occupied as a lot, as an alley or street, said designation would not in any manner affect the right of the occupant of the lot.

In Ashby v. Hall, 119 U. S. 526—Bk. 30 L. 469, it is said:

"The interests which the occupants possessed previous to the entry either in the land occupied by them, or in the rights of way over adjoining streets and alleys, were secured by it.

"The power vested in the legislature of the territory was confined to regulation for the disposal of lots and the proceeds of the sales. These regulations might extend to provisions for the ascertainment of the nature and extent of the occupancy of different claimants of lots, and the execution and delivery to those found to be occupants in good faith or some official recognition of title in the nature of a conveyance; *but they could not authorize any diminution of the rights of the occupants as established.*

In Bingham v. Walla Walla, 13 Pac. 408 (412), is said:

"The act, however, did not contemplate the existence of *power in any person or authority in the new town,*

to make a plat of lots, blocks, streets and alleys, *which did not exist as a fact* and to which plat the occupants had not given their assent, and to bind them in the future determination of their interests by such plat."

In Goldberg v. Kidd, 48 N. W. 574 (576-577), it is said:

"As to the lots actually occupied when the entry was made, we think the word disposal must be construed to mean "distribution," which words are often used synonnomously, for, as to such lots, they were already disposed of; that is, they became at once the property EQUITABLY of the occupants.

Citing, Cofield v. McClellan, 16 Wall 334;
Stringfellow v. Cain, 99 U. S. 610.

See McClaskey v. Pac. Coast Co., 160 Fed. 794, decided 2-17-08, C. C. A., Ninth circuit, holding that the trustee, "has no power as against the individual occupants to dedicate land in the site to public use for street purposes."

In City of Pueblo v. Kidd, 36 Pac. 599 (601), it is said:

"The entry of the townsite therefore, in trust for the several use and benefit of the occupants thereof, according to their respective interests, each of such occupants at the time of the entry became to the extent of their respective holdings, beneficiaries of the trust, and were vested with equitable ownership of the lot or parcel of land to the extent of their occupancy.

On the point, that the Mayor-Trustee and the Surveyor could not take private property, we cite further,

City of Helena v. Albertose, 8 Mont. 499.
Tredway v. Wilder, 8 Nev. 91.
Bingham v. Walla Walla, 3 Wash. Terr. 68, 13 Pac. 408.
Hall v. Ashby, 2 Mont. 489.
Alemany v. City of Petaluma, 38 Cal. 553.
Town of Aspen v. Rucker, 10 Colo. 184.

Denver v. Dent.
Town Co. v. Maris, 11 Kas. 128.
Rathbone v. Sterling, 25 Kas. 444.
Scully v. Fix, 13 Idaho, supra.

POINT 5.

A FUNDAMENTAL ERROR OF PLAINTIFF IN ERROR.

The plaintiff in error has fallen into the following fundamental errors:

1. In contending that the Surveyor and Mayor-Trustee had power to take private property without compensation.
2. In holding under the Idaho Session Laws, that the rights of the occupant were to be measured as of time of application to enter in the land office.

The first point has been discussed; the second one needs but little consideration.

On this point, the law of Congress provides:

Section 2387 (inter alia):

> "* * * the execution of which trust as to the lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated."

The Territorial law, enacted in virtue of this authority and hence an integral part thereof, provides:

> "Section 2 (Page 11 of Counsel's brief): That the streets, lanes, alleys and other rights of way which may be in common use *at the time of the enforcement of this act within the said city*, over the lands described in the aforesaid patent, are hereby declared to be public high ways, for the use and benefit of the inhabitants of said

city in common, and that the survey and platting of the said land into blocks and lots, acres or parts of same *shall conform thereto* That the survey and platting of the land described in the aforesaid patent for said city of Lewiston, shall be so as to divide the blocks into lots, to be, whenever practicable, each *fifty feet in width* and one hundred feet in depth and the fractional block or blocks lot or lots, acre or acres shall be so arranged and adjusted as to *conform to the condition of the improvements and occupation at the time of the enforcement of this act.*

That where streets, alleys, roads, or other rights of way have been obtained, may have been reserved or claimed by the inhabitants in common of the said city, as streets, alleys, roads, or other rights of way and may be occupied *at the time of the enforcement of this act* by individuals are hereby declared to be public highways for the purposes, use and benefit of the inhabitants of said city of Lewiston in common.

It is thereofre quite plain, that so far as Lewiston, is concerned, the survey preserved the rights of lot holders as they existed

"At the time of the enforcement of this act;"

and it also preserved the streets, alleys, etc., as they existed

"At the time of the enforcement of this act;"

and it also declared that the surveyor should have due regard to the occupancy and improvements of the several occupants, as their rights existed

"At the time of the enforcement of this act;"

It is therefore, somewhat startling to find the able counsel for plaintiff in error, contending that the rights were to be determined as of the *time of the entry* (1871) whereas, the act of Congress and the Territorial Act referred to, expressly provide that rights are to be determined as of the time of the enforcement of the Territorial Act which was not passed until January 8th, 1873.

Now, the time of the enforcement of the act was 1875 and there after. The plat was made in 1874, approved June 22, 1875, but not recorded until 1879 (Plat at Pages 28-29).

We have shown that in July, 1875, and up to the 15th of that month, the applications of Mulkey, Squier, Moxley, Lowenberg Brothers, Lowenberg Brothers as amended as to Lot 6 Block 23, and Vollmer were all filed. Thereafter, and from Sept. 23, 1875, to Dec. 15th, 1875, the deeds to these properties were executed, conveying to the users, their rights to the south line of "D" street as established by user.

These deeds recite an amendment and state that the same are executed according to the plats of the city. We have also shown at Page 99 that there was a suit brought by Lowenberg Brothers against the Mayor-Trustee, and offered there the entire judgment roll. But this was excluded on objection of plaintiff in error.

POINT 6.

THE PRESUMPTION IS THAT OFFICERS DO THEIR DUTY.

If, therefore, the deeds executed in December, 1875, recite that they are executed in virtue of the plats "as amended" and if we were offering to show that there was a suit against the Mayor-Trustee involving this survey, and if further the deeds referred to, located this south line of "D" street at the place where it was established by user, would not the presumption carry that after the suit referred to, the plat was in fact amended as shown by the red lines?

Counsel as Pages 42 et seq. of his brief, contends that the parties for whom the survey was made, should have carried this question of the correctness thereof, into court. But here is the record evidence that it *was carried into court.* He also contends that such suit must have been begun within six (6) months; but here is the certificate from the Mayor-Trustee, deeding the lands within a period of six (6) months after the approval of the plat, *showing that the plat was amended.*

WHERE IS THERE ANYTHING TO SHOW THAT THIS PLAT WAS NOT AMENDED BEFORE ITS APPROVAL?

This matter has lain dormant for all time since 1875 up to the institution of this suit; the City has acquiesced in the use of the south line of "D" street; Scully and his predecessors did the same thing; the body politic has permitted thousands of dollars to be expended on the theory that the south line of "D" street was as established by user, and the only protest ever made is from Matthew Scully, who does not claim that either he or the city ever used any part of the lands in controversy as a street, but who admits at Page 49 that no part of this land in controversy was ever used as a street; and these defendants in error during all that time, and for years before the enforcement of the Territorial Act (passed in 1873) have continuously maintained and now maintain, buildings and improvements covering their claims and no more. We have demonstrated that this "D" street existed as we claim, in 1862; and that the buildings then conformed thereto, and still conform thereto.

POINT 7.

Under these circumstances, we contend that the doctrine of

"Laches and equitable estoppel"

are sufficient to decide this case against plaintiff in error.

1. Because the City of Lewiston is not now complaining;
2. Because plaintiff in error has himself used this south line of "D" street as established by user, as the correct south line for years;
3. Because the plaintiff in error permits and consents to the maintenance of the building on Lot one (1), Block 24, as Dr. Moxley's drug store, which comes out to the old south line as established by user, and makes no protest against such use.
4. Because the plaintiff in error permits Robert Gro-

stein or his successors, to maintain immediately west of Plaintiff a building which comes out almost to the old South line of "D" street, and makes no protest against the same (See testimony of Briggs Pages 54-55, and the map he drew at Page 54). (Also testimony of Scully at Pages 68). (Also the testimony of Wrighter, Pages 59 to 61, and map at Page 59).

5. Because it was shown that every modern building on this south side of "D" street, conformed to the old line as established by user, and the plaintiff in error makes no contention that the LINE OF "D" street, at any place except in front of the new buildings of Fix, Moxley and Squier, was erroneous.

6. Because Matthew Scully acquired his Lot six (6), Block 24, in about the year 1897 or 1898 (Page 50 Record) and testifies so.

"I think I owned that land about two years before I tore down or removed the frame building and during that period I owned a frame building that ran out nearly as far as the other does, and I couldn't say how long that building had been there, but a long time by the looks of it. I had no information about it. It was there when I first came to Lewiston in 1877 and I don't know how much longer, and it was not a new building then."

At Page 46, the plaintiff in error testifies,

"I came to place my building where it is in this way; prior to the construction of the building, which was in the month of *April*, 1900, I employed the city engineer, etc., etc.

7. And because Matthew Scully had owned Lot six (6), Block 24, for seven (7) years at least before the institution of this action, which was instituted October 2nd, 1905, (Record Page 6),

and the statute of Idaho on Limitations of actions provides, at Section 4036 R. S. Idaho, 1887,

"No action for the recovery of real property or for the recovery of the possession thereof, can be maintained unless it appears that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the property in question, within five years before the commencement of the action; and this section includes possessory rights to lands and mining calims."

7. Because no person, either the City of Lewiston or plaintiff claims that this land in controversy was ever a street, and because the actual occupancy of these lots as private premises was shown to have existed for a time anterior to the application to enter the townsite, and the street was shown to have been established by use since 1862, and hence for 43 years prior to the institution of this action and no claim to the same as street was ever made by any person.

8. Because R. S. Idaho, Section 852, provides:

"A road not worked or used for the period of five years, ceases to be a highway for any purpose whatever."

9. Because Matthew Scully does not claim that he was ever possessed of any rights in or to the property in controversy or any part thereof.

It is well settled in this court, that a claim which has run the statutory period, is barred by its staleness, even in equity.

Hall v. Law, 12 Otto; Bk. 26 L. 217.

United States v. Bebee, 17 Fed. 36; 39, (Collates authorities).

This case was approved by this court in

United States v. Beebe, 127 U. S. 338; Bk. 32 L. 121.

The findings of fact, and the decision of the Supreme Court, sustain this defense. See

Scully v. Fix, 13 Idaho 417.

POINT 8.

Further, there is no Federal question presented by this record on the part of the plaintiff in error, because the pleading (complaint) of the plaintiff in error does not set out a Federal question. In

Colorado Central Mining Co. v. Turck, 150 U. S. 138-142,

it is said: (Concerning the contention that an investigation may be extended into the pleadings evidence, and rulings, to maintain jurisdiction):

> "To maintain this proposition it is contended that reference may be made to the entire pleadings, the evidence or the rulings of the courts below. This view, however, ignores the settled doctrine that the inquiry in such cases as this, into the jurisdiction of the Circuit Court, is limited to the facts appearing on the record in the first instance. This has been often so held in the enforcement of the inflexible rule which requires this court in the exercise of its appellate power, to deny the jurisdiction of courts of the United States in all cases, where such jurisdiction does not affirmatively appear in the record, on which it is called upon to act."

See also,

Press Publishing Co. v. Monroe, 164 U. S. 105-110, holding,

> "It is the plaintiff and not the defendant who can invoke the Constitution and laws of the United States so as to give the Federal Courts jurisdiction."

See also,

B. & M. Cons. Copper Co. v. Montana Ore Purchasing Co., 188 U. S. 632-640.

Third Street and Suburban R'y Co. v. Lewis, 173 U. S. 457-460.

Stevenson v. Fain, 195 U. S. 165.

Colorado Central M. Co. v. Turck, 150 U. S. 138-142.

In conclusion, we contend that the evidence heretofore quoted and the record at bar, show that:

1. The south line of "D" street as established by user, has existed as contended for by defendants in error, since 1862;

2. That the survey by E. B. True, which cut off four feet of the lots and embraced within the designated delineation of "D" street, lands which never were street, was void and beyond his power and in excess of his authority, for the reasons heretofore stated.

3. That the plaintiff in error is estopped from claiming or attempting to claim that any part of the lands in controversy was ever a street at any time.

4. That the City of Lewiston is the only party in interest, and because it has lain dormant for over thirty years and has seen valuable buildings and improvements made and has permitted this south line of "D" street at all times to stand as the correct line, that no authority now rests in any court to change or alter it.

5. That the plats were amended and the deeds heretofore given establishing the south line of "D" street as contended for by defendants in error.

6. That the decision of the Supreme Court of Idaho in Scully v. Fix, 13th, Idaho 417; 90 Pac. 573,

is the correct interpretation of the alw as applied to the facts of this case, and should be affirmed.

Respectfully submitted,

James H. Torrey
Attorney for defendants in error

John M. Smith
Of Counsel.

SCULLY *v.* SQUIER

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

No. 21. Argued November 5, 1909.—Decided November 29, 1909.

Where plaintiff bases his bill on the contention that under the townsite law, § 2387, Rev. Stat., the ascertainment of boundaries by official survey is a condition subsequent upon which the vesting of the equitable rights of the occupant depends, the construction of a law of the United States is involved, and, if passed on adversely by the state court, this court has jurisdiction under § 709, Rev. Stat., to review the judgment.

The object of local legislation authorized by the townsite law, § 2387, Rev. Stat., is to consummate the grant of the Government to the townsite occupants—not to alter or diminish it—and in this case the construction by the state court of the territorial statute followed to the effect that the trustee and surveyor had no power to alter or diminish the holdings of *bona fide* occupants by laying out or widening streets.

13 Idaho, 428, affirmed.

THE facts are stated in the opinion.

Mr. H. Winship Wheatley, with whom *Mr. Ben F. Tweedy* was on the brief, for plaintiff in error:

As to the jurisdiction: The legal title after entry and until patent to the mayor-trustee was in the United States, *Hussey* v. *Smith*, 99 U. S. 20; *Ashby* v. *Hall*, 119 U. S. 526; *Cofield* v. *McClelland*, 16 Wall. 331; *Stringfellow* v. *Cain*, 109 U. S. 610, and one having an equitable title had an absolute right to have his title confirmed by the trustee under § 2387, Rev. Stat., the townsite law. *Hussman* v. *Durham*, 165 U. S. 144; *Chever* v. *Horner*, 142 U. S. 122; *McDonough* v. *Millandon*, 3 How. 693.

When the question decided by the state court is not merely of weight or sufficiency of evidence but of its competency and effect as bearing on question of Federal law jurisdiction to re-

view exists. *Dower* v. *Richards*, 151 U. S. 658; *Mackey* v. *Dillon*, 4 How. 419; *Almonester* v. *Kenton*, 9 How. 1.

The mayor-trustee was an officer of both the Federal and Territorial governments. *Anderson* v. *Barlets*, 3 Pac. Rep. 225; *Ming* v. *Foote*, 23 Pac. Rep. 515; *Helena* v. *Albertose*, 20 Pac. Rep. 817.

For other cases on the jurisdiction of this court to review decisions involving confirmation of title and authority of United States officers, see *Maguire* v. *Tyler*, 1 Black, 196; *Carondelet* v. *St. Louis*, 1 Black, 179; *Mobile Transp. Co.* v. *Mobile*, 187 U. S. 479; *Canal Co.* v. *Paper Co.*, 172 U. S. 58; *Hussman* v. *Durham*, 165 U. S. 144; *Nor. Pac. R. R. Co.* v. *Colburn*, 164 U. S. 383; *Shively* v. *Bowlby*, 152 U. S. 1; *Pickering* v. *Lomax*, 145 U. S. 310; *Anderson* v. *Carkins*, 135 U. S. 483; *Neilson* v. *Lagon*, 7 How. 772; *Chouteau* v. *Eckhart*, 2 How. 334; *Pollard* v. *Kibbe*, 14 Pet. 353; *Wallace* v. *Parker*, 6 Pet. 680; *Ross* v. *Barland*, 1 Pet. 655; *Water Power Co.* v. *Green Bay Canal Co.*, 178 U. S. 254; 11 Cyc. 936; *Stanley* v. *Schwalby*, 162 U. S. 255.

Under § 2387, Rev. Stat., the entry initiates the grant collectively and the grant to the individual cannot take effect until the extent of his occupancy has been defined. *Newhouse* v. *Semini*, 3 Washington, 648, 652; *Ashby* v. *Hall*, 119 U. S. 526. The grant was not confirmed until the official survey was subsequently filed, and the survey after confirmation cannot be impeached, and power exists to have the grant correctly surveyed before individual rights attach. *Moore* v. *Walla Walla*, 2 Pac. Rep. 187; *Boise City* v. *Flanagan*, 53 Pac. Rep. 453; *Laughlin* v. *Denver*, 50 Pac. Rep. 917; *Galt* v. *Galloway*, 4 Pet. 332; *Haydel* v. *Dufresne*, 17 How. 23; *Greer* v. *Mezes*, 24 How. 268; *Cragin* v. *Powell*, 128 U. S. 691.

The mayor-trustee had no power to deed any person a part of a surveyed street. *Amador County* v. *Gilbert*, 65 Pac. Rep. 130; *Pachen* v. *Ashby*, 1 Pac. Rep. 130; § 3, Idaho Territorial Act; *State* v. *Webster*, 72 Pac. Rep. 295.

The deeds and the official survey are conclusively binding

upon the defendants in error, and they can have no equitable rights in and to the land claimed by them and have not the legal title to any of it. The land claimed by them forms a part of the Congressional grant to the aggregation, to the city of Lewiston, possession of such land has been, at all times since the acceptance of deeds upon the official survey of D street, if any possession dates back to this period, wrongful and unlawful and the maintenance of a private and public nuisance, giving no possessor thereof any rights in law or in equity as against the city or as against the plaintiff in error. Cases *supra; Woodrull* v. *Mining Co.*, 9 Sawy. 513, 517; *S. C.*, 18 Fed. Rep. 753; *Mills* v. *Hall*, 9 Wend. 315; *McLean* v. *Iron Works*, 83 Pac. Rep. 1083; *Wolfe* v. *Sullivan*, 32 N. E. Rep. 1018; *Hall* v. *Breyfogle*, 70 N. E. Rep. 883; *Blin* v. *Blankenship*, 77 S. W. Rep. 919; *Village of Lee* v. *Harris*, 69 N. E. Rep. 230; *Atlantic City* v. *Snee*, 52 Atl. Rep. 372; *Lewiston* v. *Booth*, 34 Pac. Rep. 809; *Webb* v. *Birmingham*, 9 So. Rep. 161; *Oakland* v. *Oakland Co.*, 50 Pac. Rep. 277; *Orena* v. *Santa Barbara*, 28 Pac. Rep. 268; *Mills* v. *Los Angeles*, 27 Pac. Rep. 354; *Visala* v. *Jacobs*, 4 Pac. Rep. 433; *People* v. *Pope*, 53 California, 437; *Sullivan* v. *Tichner*, 53 N. E. Rep. 759; *Cheek* v. *Aurora*, 92 Indiana, 107; *Lee* v. *Mund Station*, 8 N. E. Rep. 759; *Waterloo* v. *Union Mills Co.*, 34 N. W. Rep. 197; *Louisiana &c. Co.* v. *New Orleans*, 9 So. Rep. 21; *Sheen* v. *Stothart*, 29 La. Ann. 630; *New Orleans* v. *Magoon*, 4 Mart. (La.) 2; *Thibodeaux* v. *Maggiole*, 4 La. Ann. 73; *Witherspoon* v. *Meridian*, 13 So. Rep. 843; *Vicksburg* v. *Marshall*, 59 Mississippi, 563; *Territory* v. *Deegan*, 3 Montana, 82; *Hoboken Land Co.* v. *Hoboken*, 36 N. J. L. 540; *State* v. *Trenton*, 36 N. J. L. 198; *Jersey City* v. *State*, 30 N. J. L. 521; *Tainter* v. *Morrison*, 18 N. J. L. 46; *Cross* v. *Morrison*, 18 N. J. L. 306; *Jersey City* v. *Morris Canal Co.*, 12 N. J. Eq. 547; *Orphan Asylum* v. *Troy*, 32 Am. Rep. 286; *Morrison* v. *New York Co.*, 74 Hun (N. Y.), 398; *Milhau* v. *Sharp*, 27 N. Y. 611; *Mills* v. *Hall*, 9 Wend. (N. Y.), 315; *Commonwealth* v. *Moorhead*, 12 Atl. Rep. 424; *Kopf* v. *Utter*, 101 Pa. St. 27; *Kittaning Academy* v. *Brown*, 41 Pa. St. 269; *Baxter* v. *Com-*

monwealth, 3 Penn. & W. 253; *Commonwealth* v. *McDonald*, 16 Serg. & R. (Pa.) 390; *Philadelphia* v. *Crump*, 1 Brewst. (Pa.) 320; *Philadelphia* v. *Friday*, 6 Philadelphia, 276; *Chafe* v. *Aiken*, 35 S. E. Rep. 800; *Sims* v. *Chattanooga*, 2 Lea (Tenn.), 694; *Memphis* v. *Lenore R. Co.*, 6 Coldw. (Tenn.) 412; *Raht* v. *Southern R. Co.*, 50 S. W. Rep. 72; *Pates* v. *Warrenton*, 84 Virginia, 337; *Taylor* v. *Commonwealth*, 29 Gratt. (Va.) 780; *Ralston* v. *Weston*, 33 S. E. Rep. 326; *Teas* v. *St. Albans*, 17 S. E. Rep. 400; *Childs* v. *Nelson*, 33 N. W. Rep. 587; *Simplot* v. *Chicago R. Co.*, 5 McCreary, 158; *Grogan* v. *Hayward*, 6 Sawy. 498; *Miller* v. *Indianapolis*, 101 Indiana, 200.

The enclosure and possession of a platted street which has been dedicated are immaterial, however long continued. Cases *supra; Hall* v. *Breyfogle*, 70 N. E. Rep. 883; *Wolfe* v. *Sullivan*, 32 N. E. Rep. 1018; *Village* v. *Harris*, 69 N. E. Rep. 230.

The possession relied upon by the defendants in error has at all times been wrongful and unlawful and they encroach upon the legal and lawful street with an occupation which deprives the plaintiff in error of his rights under the laws of Congress and he should have a mandatory injunction against them; for the appurtenant rights of the plaintiff in error are not confined to the front of his lot, but extend to that part of the street in front of adjoining lots. *Dooly Block* v. *Salt Lake Co.*, 33 Pac. Rep. 229; *First National Bank* v. *Tyson*, 32 So. Rep. 144; *Lahr* v. *Metropolitan Co.*, 104 N. Y. 268; *Beaver* v. *Baltimore &c. Co.*, 58 Atl. Rep. 21; *Dill* v. *Board*, 10 L. R. A. 281; *Healy* v. *Kelly*, 54 Atl. Rep. 588; *McLean* v. *Llewellyn Iron Works*, 83 Pac. Rep. 1083; *Tilly* v. *Mitchell & Lewis Co.*, 98 N. W. Rep. 969; *Hall* v. *Breyfogle*, 70 N. E. Rep. 883; *Wolfe* v. *Sullivan*, 32 N. E. Rep. 1018; *Atlantic City* v. *Snee*, 52 Atl. Rep. 372; *Bohne* v. *Blankenship*, 77 S. W. Rep. 919.

Mr. James H. Forney and *Mr. Isham H. Smith* for defendant in error submitted:

The writ of error should be dismissed. There is no Federal

question. The only question is one of boundary. *Telluride Co.* v. *Rio Grande Ry. Co.*, 175 U. S. 639; *Moreland* v. *Page*, 20 How. 523; *Lanfear* v. *Hunley*, 4 Wall. 204; *McDonough* v. *Milandon*, 3 How. 693; *Almonester* v. *Kenton*, 9 How. 1; *Farmers' Heirs* v. *Eslava*, 9 How. 420; *Farmers' Heirs* v. *Mobile*, 9 How. 451.

The judgment is sustained on grounds other than Federal. *Chapman Land Co.* v. *Bigelow*, 206 U. S. 41; *Rutland R. R. Co.* v. *Central Vermont R. R. Co.*, 159 U. S. 630.

The nature of the grant under the Federal townsite laws, is that of confirmation of rights in existence. No new grant is made—simply the ascertainment of rights already in existence, and their certification. This is analogous to the deed of confirmation described by Blackstone. *Scully* v. *Fix*, 13 Idaho, 471; *Goldberg* v. *Kidd*, 58 N. W. Rep. 574; *Pueblo* v. *Budd*, 36 Pac. Rep. 599; *Cofield* v. *McClelland*, 16 Wall. 334; *Stringfellow* v. *Cain*, 99 U. S. 610; *Town Co.* v. *Maris*, 11 Kansas, 128–151; *Rathbone* v. *Sterling*, 25 Kansas, 444; *Helena* v. *Albertose*, 20 Pac. Rep. 817; *McCloskey* v. *Pac. Coast Co.*, 160 Fed. Rep. 194.

The mayor-trustee and the surveyor were not "granting" lands to these occupants. Their rights and duties were prescribed by the law itself, and neither could by exceeding the power given him, divest property rights nor defeat vested rights. *United States* v. *Thurber*, 28 Fed. Rep. 56; *Parcher* v. *Ashby*, 1 Pac. Rep. 204; *Ashby* v. *Hall*, 119 U. S. 526; *Bingham* v. *Walla Walla*, 13 Pac. Rep. 408; *Goldberg* v. *Kidd*, 48 N. W. Rep. 574; *Cofield* v. *McClelland*, 16 Wall. 334; *Treadway* v. *Wilder*, 8 Nevada, 91; *Alimany* v. *Petaluma*, 38 California, 553; *Aspen* v. *Rucker*, 10 Colorado, 184; *Town Co.* v. *Maris*, 11 Kansas, 128; *Rathbone* v. *Sterling*, 25 Kansas, 444.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The relation of the parties to the cause of action is the same in this court as in the state courts, and we will refer to plaintiff

in error as plaintiff and to the defendants in error as defendants.

The pleadings in the case are exceedingly voluminous and equally so are the findings of fact. It is enough for our purpose to say that the city of Lewiston, State of Idaho, was entered as a townsite under § 2387 of the Revised Statutes, hereinafter quoted, and a patent was issued by the United States to the mayor of the city in trust for the occupants of the lands conveyed. In pursuance of the trust the mayor executed conveyances to the predecessors in title of plaintiff and defendants. The rights derived through these deeds, and the occupation of the land preceding and subsequent to them, and the effect of a survey made by one E. P. True, hereinafter referred to, and the plat thereof filed by him, constitute the questions in the case. Plaintiff seeks by this suit to enjoin defendants from encroaching on D street, as laid down on said plat, by certain buildings which, it is alleged, they proposed to erect. It is prayed, besides, that the buildings, if erected before an injunction can be obtained, be declared a public nuisance, "damaging the public and this plaintiff's private rights," and be abated. The special damage alleged is that plaintiff, having erected a building, on what he alleges to be the true boundary line of D street, will be, as it was said in the argument, "put into a hole" by the buildings of defendant projecting beyond it, and that light and air thereto, through the doors and windows of plaintiff's building, will be prevented, and the view therefrom to all parts of D street obstructed, and that "the light and air and view from all parts of the said D street as the said building [plaintiff's building] is constructed, necessarily ensue and benefit the said property materially, and are of great value to the plaintiff, and as is also the right of egress and ingress."

It is further alleged that before erecting his building plaintiff applied to the city engineer to be shown the original south line of D street according to the original survey, and the engineer ran "the lines on the ground according to the said

original survey and plat," and that plaintiff erected his building in accordance therewith, "covering the entire lot."

It is also alleged that the lots owned by defendants were conveyed by the mayor to the original owners according to the original survey, and "deeds thereto accepted according to the said original survey and plat, and said lots have since been conveyed to the defendants and their grantors according to the said original survey and plat." A dedication of the street to the public is averred as hence resulting, and an estoppel against defendants to dispute the survey and plat. The answer of the defendants, in effect, denies the correctness of the survey and plat made by True, and avers that there was an amendment of the latter which exhibited the streets and alleys according to the occupation of the respective claimants of the lots. It is admitted, however, that some of the deeds issued were in accordance with the plat, but it is denied that all the deeds were, and averred "that the same were in accordance with the use and occupation of the lands prior to the survey, and with the said survey and plat, as the same were and had been amended."

The findings of the trial court sustained these averments, and found further that the True survey as originally made disregarded the lines of occupation of the lots, and "ran through buildings then in the actual use and occupancy of the claimants of land and cut off approximately four feet from the north end of buildings there standing and in actual use and occupation of *bona fide* claimants."

A decree was passed dismissing the suit, which was affirmed by the Supreme Court. 13 Idaho, 417.

All of the parties, as we have said, derived their rights and titles under § 2387 of the Revised Statutes, providing for the reservation and sale of townsites on the public lands. That section is as follows:

"(Entry of town authorities in trust for occupants.) Whenever any portion of the public lands have been or may be settled upon and occupied as a townsite, not subject to entry

under the agricultural preëmption laws, it is lawful, in case such town be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judge of the county court for the county in which such town is situated, to enter at the proper land office, and at the minimum price, the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated."

We have not recited, nor do we think that it is necessary to recite, all of the facts found by the lower courts. We may add to those which we have stated that the city of Lewiston was incorporated under the laws of the Territory of Washington, it then being within that Territory, and was reincorporated by an act of the legislature of Idaho in 1866, it then being within Idaho. The act defined the boundaries of the city. Levi Ankeny was mayor of the city in 1871, and on November 21 of that year he filed his declaratory statement No. 39 in the United States land office at Lewiston, proposing to enter the lands included within the borders of the city as incorporated, in trust for its inhabitants, claiming settlement in 1861. Cash entry was made for the lands June 6, 1874, by Henry W. Stainton, mayor, in trust for the inhabitants. "The legislature of the Territory, [we quote from the opinion of the Supreme Court of the State, 13 Idaho, p. 428] by an act approved January 8, 1873 (7th Sess. Laws, p. 16), provided for the survey, platting and disposal of the land in the city of Lewiston pursuant to the United States statutes in regard to such matters. Said act provides that the mayor-trustee shall cause to be made and filed in his office by a competent person a plat of the land within said city, divided into blocks and lots, and 'to make and deliver to the *bona fide* occupants of such portions of said lands described in said patent from the Government of

the United States who may be entitled thereto, good and sufficient deeds of conveyance in fee simple according to their respective rights.'

"Under the provisions of said laws one E. B. True was employed to survey and plat the lands in said town, and was commanded to adjust said plat so as to conform to the conditions of the improvements and the use and occupation of such lands by the settler, and the mayor was required to make and deliver to the *bona fide* occupants of such lands good and sufficient deeds of conveyance in fee simple, according to their respective interests, under the provisions of said law.

"It appears from the evidence in the case that said True made a plat of said town, including block 24, in which block are the lots involved in this case, so as to make the lots about forty-six feet long, north and south, when, as a matter of fact, most, if not all of the lots in that block were fifty feet long, north and south, as indicated by the buildings and other improvements thereon."

The Supreme Court said, 13 Idaho, p. 429:

"The question is fairly presented as to whether said True had any authority whatever to make said plat so as to interfere with and cut off a part of the buildings and improvements of the occupants of such lots. In other words whether under the law a surveyor, who is employed to plat such a townsite after its entry by the proper officer, can widen a street, and in doing so cut off a portion of the buildings and improvements of the lot owners bordering on such street."

The question was answered in the negative, and the judgment of the trial court, which was adverse to plaintiff, was affirmed. In some aspects the answer may be said to have been put upon the statute of the State of January 8, 1873, providing for the survey, platting and disposal of the land. The court observed that there was no dispute that the evidence established that the defendants claimed and occupied their lots to the extent they had claimed for many years prior and subsequently to the survey, and that it was not shown or

claimed that part of the lots was used as a street, nor that the city ever claimed any part of them as a street. And it was said (p. 433): "The city surveyor cannot make any portion of said lots a street by simply making a plat and indicating on such plat that said lots were only forty-five or forty-six feet in length." The claim by defendants was of fifty feet. The court further said (p. 433): "The mayor-trustee, had no judicial power in this matter—neither had the surveyor. The surveyor and mayor cannot dedicate to the public as a street parts of lots occupied and possessed by individuals." This, it may be contended, is a mere construction of the statute of the State of Idaho, and nothing more, in other words, a decision that under the statute there was no power given to make a survey or plat which did not conform to the lines of occupation. The contention of plaintiffs, however, is that "the laws of Congress authorize an official ascertainment" of the boundaries of the city, and "that the equitable right under the said laws of Congress vests upon a condition subsequent, which is that the owner of the equity must within a reasonable time have his right confirmed by the trustee upon an official survey ascertaining and settling its boundaries and nature, and that the laws of Congress require each townsite occupant to see to it that the official ascertainment is true and correct and satisfactory before accepting confirmation of his equitable rights from the mayor, trustee." It is hence insisted that a construction of the laws of Congress is involved. This contention, we think, is the basis of plaintiff's bill of complaint, and it seems also to have been passed on by the Supreme Court of the State. The court said (p. 433): "The appellant [plaintiff in error here] rests his case here on the making and approval of said plat," (that is, the plat made by True,) and the contention was discussed. We think, therefore, the motion to dismiss should be overruled.

But a little more discussion is necessary to pass on its merits. Section 2387 constitutes the grant of title, and it is very explicit as to grantees, to the matter granted, and for whose use

it is granted. The grant is of lands occupied as a townsite, the grantees are the corporate authorities thereof, or the judge of the county court where the town is situated, "in trust for the several use and benefit of the occupants thereof, according to their respective interests." And the legislation of Idaho, enacted in pursuance of § 2387, provides, as we have seen, that the mayor shall cause to be made and filed in his office a plat of the land divided into lots and blocks, but it is also provided that he is required, as trustee, "to make and deliver to the *bona fide* occupants of such portions of said lands described in said patent from the Government of the United States, who may be entitled thereto, good and sufficient deeds of conveyance in fee simple, according to their respective rights." The object of the state legislation, therefore, was to consummate the grant of the Government to the occupants of the land, not to alter or diminish it. The grant was through the mayor to the occupants of the lands. The extent of their occupation was the extent of their rights; determined, therefore, the relation of their lots to the streets and alleys; fixed the location of the streets and alleys. Or, as it is epigrammatically expressed by the Supreme Court of the State, "It must be kept in mind that Lewiston existed prior to the True survey. The settlers did not acquire their right under the plat nor by virtue of it. The survey and plat was made for them; they were not made for the survey and plat." But we need not make a universal application of this. It is enough for the present case that the Supreme Court so construed the power of the mayor and the surveyor under the Idaho statute. It may well be contended, however, that the Supreme Court expressed a principle that has broader application, expressed as well the meaning of the act of Congress. In *Ashby* v. *Hall*, 119 U. S. 526, this court said (p. 529), speaking by Mr. Justice Field, "That the power vested in the legislature of the Territory (Montana) in the execution of the trust (under § 2387), upon which the entry was made, was confined to regulations for the disposal of the lots and the proceeds of the sales. These regulations might

extend to provisions for the ascertainment of the nature and extent of the occupancy of different claimants of lots, and the execution and delivery to those found to be occupants in good faith of some official recognition of title, in the nature of a conveyance. But they could not authorize any diminution of the rights of the occupants when the extent of their occupancy was established. The entry was in trust for them, and nothing more was necessary than an official recognition of the extent of their occupancy. Under the authority conferred by the townsite act the legislature could not change or close the streets, alleys and blocks of a town by a new survey. Whatever power it may have had over them did not come from the act, but, if it existed at all, from the general grant of legislative power under the organic act of the Territory." See also *Stringfellow* v. *Cain*, 99 U. S. 610; *Cofield* v. *McClelland*, 16 Wall. 331; *Hussey* v. *Smith*, 99 U. S. 20. Many state cases are to the same effect, and may be found in the notes to § 2387 in the United States Federal Statutes Annotated, vol. 6, page 344 *et seq.*

Further discussion is unnecessary. Plaintiff's other contentions are either disposed of by the facts found by the state courts or do not present Federal questions.

Judgment affirmed.